85-782

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

LUZ MARINA CARDOZA-FONSECA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether an alien's burden of proving eligibility for asylum pursuant to Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), is equivalent to his burden of proving eligibility for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. 1253(h).

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The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 767 F.2d 1448. The opinions of the Board of Immigration Appeals (App., *infra*, 17a-23a) and of the immigration judge (App., *infra*, 24a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 101(a)(42) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(a)(42), provides in pertinent part:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion * * *.

Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), provides:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

Section 243(h)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253(h)(1), provides in pertinent part:

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

1. Respondent is a 37-year old native and citizen of Nicaragua. She entered the United States on June 25, 1979, as a nonimmigrant visitor authorized to remain until September 30, 1979. After staying in this country beyond that date without permission, respondent was granted the privilege of voluntarily departing the United States by September 28, 1980. Respondent failed to take advantage of this opportunity, and deportation proceedings were instituted against her in March 1981. App., *infra*, 2a, 25a.

a. At a hearing in December 1981 before an immigration judge, respondent, who was represented by counsel, conceded deportability and requested asylum and withholding of deportation pursuant to Sections 208(a) and 243(h), respectively, of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), 1253(h). App., *infra*, 25a. Respondent testified that, although "she was a nonpolitical person" (*id.* at 27a), she felt that she would be persecuted in Nicaragua on the basis of the political activities of her brother, who testified that "the Sandinistas would persecute him" because he is "no longer involved with that party or sympathetic to its ends" (*id.* at 25a).

The immigration judge denied respondent's request for asylum and withholding of deportation (App., *infra*, 24a-28a). He stated that the governing legal standard was whether respondent had shown "a clear probability of persecution" if she returned to Nicaragua (*id.* at 27a). The immigration judge concluded that there was no evidence "indicat[ing] that the respondent would be persecuted for [her] political beliefs, whatever they may be" (*ibid.*). The immigration judge noted that, whatever the merits of her brother's claim that he would be persecuted, respond-

ent had not shown that any other members of her family faced a similar danger (*ibid.*).

b. The Board of Immigration Appeals dismissed respondent's appeal (App., *infra*, 17a-23a). The Board "agree[d] with the immigration judge that the respondent ha[d] failed to establish that she would suffer persecution within the meaning of section 208(a) or 243(h) of the Immigration and Nationality Act" (*id.* at 21a). In response to her contention that "the immigration judge applied the wrong legal standard" to respondent's asylum claim by requiring her to show a " 'clear probability of persecution' " rather than a " 'well-founded fear of persecution' " (*id.* at 18a-19a), the Board stated that its conclusion would be the same whether it applied "a standard of 'clear probability', 'good reason', or 'realistic likelihood' " of persecution (*id.* at 21a).

The Board determined that respondent "failed to support, through objective evidence, her generalized assertion that she will be subject to persecution based on her brother's political problems with the Sandinistas" (App., *infra*, 21a). In support of this conclusion, the Board noted that respondent "admitted that she herself has taken no actions against the Nicaraguan government[,] * * * has never been politically active[,] * * * [has] never assisted her brother in any of his political activities[,] * * * [and] has never been singled out for persecution by the present government" (*id.* at 22a). Finally, the Board characterized respondent's unsupported fears based on her relationship to her brother as "mere speculation" (*ibid.*).

2. The court of appeals reversed the Board's denial of asylum and remanded for further proceedings

(App., *infra*, 1a-16a).[1] The court held (*id.* at 4a-9a) that an alien's burden of proving a "well-founded fear" of persecution to establish eligibility for asylum is less demanding than the burden of proving a "clear probability" of persecution, which this Court held in *INS* v. *Stevic*, No. 82-973 (June 5, 1984), is the proper standard to establish eligibility for withholding of deportation. In reaching its conclusion, the court of appeals rejected (App., *infra*, 5a, 11a) the position of the Board of Immigration Appeals (*id.* at 31a) "that as a practical matter" the two standards "converge[]." *In re Acosta-Solorzano*, Interim Dec. No. 2986 (Mar. 1, 1985) (App., *infra*, 29a-68a). In the court's view, the different formulations of the burdens of proof that it mandated for obtaining asylum and withholding of deportation entailed "a significant practical consequence" (App., *infra*, 9a):

> The term "clear probability" requires a showing that there is a greater-than-fifty-percent chance of persecution. In contrast, the term "well-founded fear" requires that (1) the alien have a substantive fear, and (2) that this fear have enough of a basis that it can be considered well-founded. While in the latter case there must be some objective basis for the fear, contrary to the requirement of the "clear probability" test the likelihood of persecution need not be greater than fifty percent.

So long as an alien subjectively fears persecution, he will be eligible for asylum under the court's test if

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[1] The court of appeals' decision also addressed the Board's denial of relief to another alien, Francisca Rosa Arguello-Salguera, whose case had been separately briefed and argued. We are not seeking review of the judgment with respect to Arguello-Salguera.

he can point to specific facts "support[ing] an inference of past persecution or risk of future persecution" (App., *infra*, 10a-11a).

The court concluded (App., *infra*, 12a-13a) that the Board erred in this case by applying the same burden of proving a clear probability of persecution to respondent's asylum claim as to her claim for withholding of deportation, rather than determining separately whether respondent had a "well-founded fear" of persecution. It therefore remanded for consideration of respondent's asylum claim "under the proper legal standard" (*id.* at 14a). Respondent had not appealed the denial of her request for withholding of deportation (*id.* at 3a), and the court therefore did not disturb the Board's ruling that she is not entitled to that relief.

REASONS FOR GRANTING THE PETITION

In *INS* v. *Stevic*, No. 82-973 (June 5, 1984), this Court held that an alien must demonstrate a clear probability of persecution, defined as a showing that "it is more likely than not that the alien would be subject to persecution" (slip op. 16), in order to establish eligibility for withholding of deportation under Section 243(h) of the Immigration and Nationality Act of 1952. Although the parties and most of the amici in *Stevic* assumed that the standard for asylum under Section 208(a) of the Act is equivalent to that for withholding of deportation,[2] the Court left open the possibility that the standards might differ (slip op. 17, 22). Since *Stevic*, the courts of appeals have divided on the question left undecided in that case. The standard adopted by the Ninth Cir-

[2] Gov't Br. at 20-21 & n.21; Resp. Br. at 40; *e.g.*, Amnesty Int'l USA Amicus Br. at 54-58. But see American Immigration Lawyers Ass'n Amicus Br. at 26-27 n.23.

cuit rests on an erroneous understanding of the Act, fails to accord appropriate deference to the decisions of the Board of Immigration Appeals, and anomalously allows aliens to obtain the broader relief afforded by asylum on a lesser showing of persecution than is required for withholding of deportation. Because the proper formulation of the burden of proof that an alien must meet in order to establish eligibility for asylum is an important and frequently recurring issue on which there is a conflict among the courts of appeals, review by this Court is plainly warranted.

1. There is a direct conflict among the courts of appeals concerning the question presented by this case. In *Sankar* v. *INS*, 757 F.2d 532 (1985), the Third Circuit held that the clear probability and well-founded fear standards are equivalent (*id.* at 533):

> Our court has held unequivocably that the "well-founded fear" standard enunciated in section 1101(a)(42)(A) does not differ from the "clear probability" standard. *Rejaie v. INS*, 691 F.2d 139, 146 (3d Cir. 1982); *Marroquin-Manriquez v. INS*, 699 F.2d 129, 133 (3d Cir. 1983). Although the court decided these cases within the context of a section 1153(h) claim for withholding of deportation, the holdings equally apply in the asylum situation and control our decision in this case. * * * *Stevic* leaves our prior decisions undisturbed. We hold now that the BIA did not abuse its discretion when it equated a "well-founded fear" with a "clear probability," "good reason," or "realistic likelihood" * * *.

See also *Sotto* v. *INS*, 748 F.2d 832, 836 (3d Cir. 1984).[3] The Sixth Circuit has also held in some cases

[3] Although the court of appeals in this case correctly noted (App., *infra*, 11a n.5) that the Third Circuit's discussion of

that where, as here, the request for asylum is made for the first time after the institution of deportation proceedings, the alien must establish a clear probability of persecution in order to be eligible for asylum, just as for withholding of deportation. See *Reyes* v. *INS*, 747 F.2d 1045, 1046 (1984), cert. denied, No. 84-6145 (Apr. 22, 1985); *Dally* v. *INS*, 744 F.2d 1191, 1192, 1196 & n.6 (1984). But see *Dolores* v. *INS*, 772 F.2d 223, 225-226 (1985); cf., *e.g.*, *Moosa* v. *INS*, 760 F.2d 715 (1985) (applying different standards where request for asylum is made before deportation proceedings have commenced).[4]

In addition to the holding of the Ninth Circuit in this case,[5] the Seventh Circuit has stated in a lengthy

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the burden of proof in *Sotto* was "not necessary to its holding," it did not address the decision in *Sankar*, which squarely holds that the asylum and withholding standards are identical.

[4] The Sixth Circuit's application of the same burden of proof to certain asylum claims as to withholding of deportation claims apparently rests on an INS regulation providing that asylum requests made after the institution of deportation proceedings "shall also be considered as requests" for withholding relief. 8 C.F.R. 208.3(b); see *Dally*, 744 F.2d at 1196 n.6. This Court made clear in *Stevic*, however, that this regulation "does not speak to the burden of proof issue" (slip op. 15 n.18). In *Dolores*, 772 F.2d at 225-226, the Sixth Circuit applied different standards to asylum and withholding claims raised for the first time after the initiation of deportation proceedings without referring to its earlier decisions in *Dally* and *Reyes*.

[5] The Ninth Circuit had also stated in an earlier case that the burden of proof for asylum is different from that for withholding of deportation, but its discussion was dicta because the court held that the alien had, in any event, met the higher burden of demonstrating a clear probability of persecution. *Bolanos-Hernandez* v. *INS*, 749 F.2d 1316 (1984). Here, the court's judgment—which does not even address respondent's entitlement to withholding of deportation (see page 6, *supra*)—plainly rests on its conclusion that the Board should have applied a less demanding burden of proof to respondent's asylum claim.

dictum its view that the burden of establishing eligibility for asylum is not equivalent to that for withholding of deportation. *Carvajal-Munoz* v. *INS*, 743 F.2d 562, 572-575 (1984). While the Seventh Circuit considers the standards to be "very similar," the court made clear its position that they are "not identical" (*id.* at 575). This Court should resolve the disagreement among the courts of appeals with respect to the appropriate burden of proof in asylum cases.

2. The decision below is erroneous. In *Stevic*, this Court concluded that Congress, in enacting the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 *et seq.*, did not alter the standard that an alien must meet in order to establish eligibility for withholding of deportation (slip op. 6, 17-20). It is equally clear that Congress did not intend the anomaly of imposing a lesser burden on applicants for asylum, which provides more extensive relief than does withholding of deportation.[6] The Board of Immigration Appeals, whose construction of the Act is entitled to substan-

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[6] Unlike an alien who obtains only withholding of deportation, an alien who is granted asylum has the opportunity to become a lawful permanent resident of this country. Moreover, an asylee who obtains permanent resident status may not be deported to any country, while an alien who is granted only withholding relief may be deported to countries other than those in which he would be subject to persecution. See App., *infra*, 58a-59a; compare Sections 208 and 209, 8 U.S.C. 1158, 1159, 8 C.F.R. 209.2 (asylum) with Section 243(h), 8 U.S.C. 1253(h) (withholding of deportation). It would be unreasonable to conclude that Congress intended to permit the greater relief afforded by asylum to be granted on a lesser showing of persecution than that required for withholding of deportation.

tial deference (*INS* v. *Wang*, 450 U.S. 139, 144-145 (1981)), has recently reexamined the Act and its legislative history at length, and has adhered to its longstanding position that the burden of proof required to establish eligibility for asylum is equivalent to that for withholding of deportation. *In re Acosta-Solorzano*, *supra* (App., *infra*, 29a-68a). There is no warrant for the court of appeals' failure to defer to the Board's conclusion.

a. To be eligible for asylum under Section 208(a) of the Act, an alien must qualify as a "refugee" under Section 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). The definition of refugee in Section 101(a)(42)(A), which sets forth the "well-founded fear" requirement, was added to the Act by the Refugee Act of 1980. This new definition, along with other provisions of the Refugee Act, was intended to conform United States law to the terms of the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 *et seq.*, to which this country acceded in 1968, by eliminating the geographical and ideological limitations that had been imposed previously under the Act with respect to refugees seeking *admission* to this country. See *Stevic*, slip op. 17, 19. Congress did not intend in 1980 to alter the standard required of an alien in this country seeking to avoid deportation, a standard consistently understood, under the "well-founded fear" language of the Protocol as well as under the Act, to require a showing that the alien would more likely than not be subject to persecution.

b. The history of United States refugee law and practice prior to 1980 is recounted in *Stevic*, slip op. 6-12. Before 1968, aliens in this country seeking withholding of deportation were required to show a "clear probability" or a "likelihood" of persecution

(*id.* at 6-7).[7] In 1968, the United States acceded to the Protocol, which defined a "refugee" as one who had a "well-founded fear of being persecuted." The Protocol also required compliance with Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 176, which prohibited the expulsion of any "refugee" to countries where "his life or freedom would be threatened." As the Court concluded in *Stevic* (slip op. 9), "[t]he President and the Senate believed that the Protocol was largely consistent with existing law."

In 1973, the Board of Immigration Appeals addressed the question essentially presented in the case, whether the "well-founded fear" standard of the Protocol differed from the burden of proving a likelihood of persecution that had been applied prior to 1968. In *In re Dunar*, 14 I. & N. Dec. 310, the Board concluded, consistent with the understanding in 1968 that our law already conformed to the Protocol, that the standards are not materially different. The courts of appeals agreed that an alien must show a clear probability or likelihood of persecution in order to establish that his fear is well-founded. See, *e.g.*, *Fleurinor* v. *INS*, 585 F.2d 129 (5th Cir. 1978);

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[7] Prior to 1980, there was no statutory provision for asylum for aliens already within the United States. Withholding of deportation was available under Section 243(h) as it then stood for aliens who, in the judgment of the Attorney General, "would be subject to persecution." 8 U.S.C. (1976 ed.) 1253(h). A regulation permitting aliens to apply for asylum was added for the first time in 1974. 8 C.F.R. Pt. 108 (1975). This provision was revoked following the creation of a statutory asylum scheme in 1980. See 46 Fed. Reg. 45117 (1981). As we explain below (page 14), prior to 1980 requests for asylum were treated in relevant respects as equivalent to requests for withholding of deportation.

Kashani v. *INS*, 547 F.2d 376 (7th Cir. 1977); see also *Stevic*, slip op. 10-12.

c. Thus, prior to 1980, the "well-founded fear" standard of the Protocol was understood to be equivalent to the "clear probability" standard, both requiring a showing that it was more likely than not that an alien would be persecuted if deported. It is plain that Congress did not intend to alter this understanding when it incorporated the "well-founded fear" language as part of the definition of "refugee" added to the Act in the Refugee Act of 1980. Nor did Congress intend, in the course of systematizing the procedures under which aliens could avoid deportation on grounds of persecution, to create two alternative avenues of relief, governed by different substantive standards.

As the Court concluded in *Stevic* (slip op. 17 (emphasis in original)), "[t]he primary substantive change Congress intended to make under the Refugee Act * * * was to eliminate the piecemeal approach to *admission* of refugees" that previously existed under the Act. By contrast, Congress evinced no intent to alter the law concerning aliens already within this country or at its borders who desired to avoid deportation or return to a country in which they feared persecution. See generally *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 6 (1981). Rather, by both amending Section 243(h) and, for the first time, including in the Act a provision for asylum, Congress expressly intended simply to conform United States domestic law to reflect its international obligations under the United Nations Protocol. As the Senate Report stated, "[t]he substantive standard is not

changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees." S. Rep. 96-256, 96th Cong., 1st Sess. 9 (1979); see also H.R. Rep. 96-608, 96th Cong., 1st Sess. 17-18 (1979) (the Refugee Act "conforms United States statutory law to our obligations under Article 33" of the Convention); *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (remarks of David Martin, Office of the Legal Adviser, Department of State) ("[f]or purposes of asylum, the provisions in this bill do not really change the standards").

By the same token, both the House and Senate reports made clear that the new definition of "refugee" contained in Section 101(a)(42)(A) was intended simply to conform to the definition in the Protocol. H.R. Rep. 96-608, *supra*, at 9; S. Rep. 96-256, *supra*, at 4, 14-15. Nowhere in the legislative history of the Refugee Act is there any suggestion that the use of the phrase "well-founded fear of persecution" was intended to alter the standard by which an alien was required to prove eligibility for withholding of deportation or asylum. Rather, the legislative history indicates that the only change Congress contemplated would result from incorporation of the United Nations' definition was the elimination of the discrimination inherent in the ideological and geographical restrictions that had previously been placed on conditional entry into this country (see *Stevic*, slip op. 7, 19).

Nor is there any indication that Congress intended to drive a wedge between asylum and withholding re-

lief by mandating a lower burden of proof for the former. Indeed, as we have discussed (page 9 & note 6, *supra*), such an approach would be completely anomalous. In any event, as the Board has stated (App., *infra*, 58a n.13), "Congress understood the functions of asylum and withholding of deportation to be closely related and the standards of eligibility for these forms of relief to be essentially comparable." Prior to 1980, to the extent that an alien's request for "asylum" was considered in the context of the prohibition on deportation set forth in Article 33 of the Convention, an alien had the same burden of proof to establish his eligibility for this relief as he did for withholding of deportation under Section 243(h) of the Act (App., *infra*, 57a n.12; see also *Stevic*, slip op. 12-13 n.13). Congress intended in the Refugee Act to "preserv[e] this relationship" between the two forms of relief (App., *infra*, 57a (footnote omitted)).

In short, the prohibition on withholding of deportation contained in Section 243(h) of the Act ensures that our domestic law meets the obligations imposed through the Protocol under Article 33 of the Convention by preventing the deportation of an alien to a country where he is likely to be persecuted. Prior to 1980, Section 243(h) prevented, consistent with the Protocol, the deportation of refugees, *i.e.*, those persons with a well-founded fear of persecution. It serves the same function now. Beyond that, Section 208 of the Act gives those aliens who qualify for withholding of deportation the opportunity also to obtain the additional benefits provided by asylum (see note 6, *supra*). There is simply no basis for concluding that Congress intended to create separate avenues for relief, thereby allowing those aliens who

could not show a sufficient likelihood of persecution to obtain the legal bar to their deportation established by Section 243(h) and the Protocol a second bite at the apple under Section 208. Congress's express reliance on the "well-founded fear" standard for asylum but not for withholding relief thus was not intended to establish a lower burden of proof for asylum; and in any event, as discussed above (pages 10-12), the content of the "well-founded fear" standard had, prior to 1980, always been treated as equivalent to that of the "clear probability" requirement, an equivalence that Congress did not intend to upset in the Refugee Act.

d. Cognizant of the division among the courts of appeals that has developed since this Court left the question open in *Stevic* (see App., *infra*, 32a), the Board of Immigration Appeals recently undertook a comprehensive reexamination of its longstanding position that the "well-founded fear" standard does not, in practical terms, differ from the "clear probability" requirement. *In re Acosta-Solorzana*, *supra* (App., *infra*, 29a-68a). "Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference * * *." *United States* v. *Clark*, 454 U.S. 555, 565 (1982). Accordingly, the Board's view of the standard by which an alien must prove eligibility for asylum, as expressed in *Acosta-Solorzano*, is entitled to substantial weight. See, *e.g.*, *INS* v. *Wang*, *supra*.[8]

[8] With certain exceptions not relevant here, the Attorney General is charged with the administration and enforcement of the Act, 8 U.S.C. 1103(a). He, in turn, has delegated to the Board appellate authority over decisions of special inquiry officers in deportation cases (see 8 C.F.R. 3.1(b)(2), 242.17(c)). The Board's decisions are final unless referred to the Attorney General (8 C.F.R. 3.1(d)(2) and (h)).

The Board began its analysis with the 1973 decision in *In re Dunar*, *supra*, in which it equated the Protocol's "well-founded fear" standard with the clear probability or likelihood of persecution standard that had developed under domestic law (App., *infra*, 47a-48a). The Board noted that its construction "was accepted by the courts and thereafter 'a well-founded fear' of persecution was understood to mean that an alien had to produce objective evidence showing a likelihood or probability of persecution" (*id.* at 48a). It concluded that "Congress did not indicate in the legislative history of the Refugee Act of 1980 that it intended to alter the accepted construction of 'a well-founded fear of persecution' by using this phrase in the definition of a refugee in section 101(a)(42)(A) of the Act" (*ibid.*). Accordingly, the Board saw "no valid reason for departing from the construction of the well-founded-fear standard that prevailed in this country prior to the Refugee Act of 1980," and it decided to "continue to construe 'a well-founded fear of persecution' to mean that an individual's fear of persecution must have its basis in external, or objective, facts that show there is a realistic likelihood he will be persecuted upon his return to a particular country" (*id.* at 50a). Its treatment of the "standards for asylum and withholding of deportation [as] not meaningfully different" was, in the Board's view, "most consistent with what [it] perceive[d] to have been Congress' understanding of the relationship between asylum and withholding of deportation at the time the present provisions were enacted in the Refugee Act of 1980 (*id.* at 56a; see page 14, *supra*).[9]

[9] In the absence of clear congressional intent to the contrary, the Board surely acted reasonably in construing the applicable burdens of proof to avoid the peculiar result of granting the greater relief afforded by asylum to an alien who cannot meet the standard required for withholding of deportation (see page 9 & note 6, *supra*.)

In explaining the practical content of the "well-founded fear" standard, the Board relied on "two fundamental concepts" (App., *infra*, 50a). First, "an alien's fear of persecution cannot be purely subjective or conjectural, it must have a solid basis in objective facts or events" (*id.* at 50a-51a). Second, "in order to warrant the protection afforded by a grant of refuge, an alien must show it is likely he will become the victim of persecution" (*id.* at 51a). This standard does not "require[] an alien to establish to a particular degree of certainty * * * that he will become a victim of persecution" (*id.* at 51a-52a). "Rather, as a practical matter," the Board explained, its standard "can best be described as follows" (*id.* at 52a):

> [T]he evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.

The Board did not view the "clear probability" standard, which requires a showing that persecution is "more likely than not" to occur (*Stevic*, slip op. 16; App., *infra*, 55a), as different, in practical terms, from the showing required under the "well-founded fear" standard (*id.* at 56a):

> [T]he facts in asylum and withholding cases do not produce clear-cut instances in which such fine distinctions can be meaningfully made. Our inquiry in these cases, after all, is not quantitative, *i.e.*, we do not examine a variety of statistics to discern to some theoretical degree the likelihood of persecution. Rather our inquiry is qualitative: we examine the alien's experiences and other external events to determine if they are of a kind that enable us to conclude the alien is likely to become the victim of persecution. In this context, we find no meaningful distinction between a standard requiring a showing that persecution is likely to occur and a standard requiring a showing that persecution is more likely than not to occur. As we construe them, both the well-founded-fear standard for asylum and the clear-probability standard for withholding of deportation require an alien's facts to show [the four factors set forth above].

In light of this analysis, the Board concluded (*ibid.*) that "the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge."

The court below rejected the Board's position in *Acosta-Solorzano* (App., *infra*, 5a, 11a-12a). It concluded that an alien who subjectively fears persecution need only produce evidence showing that his fear has "enough of a basis that it can be considered well-founded" (*id.* at 9a). In attempting to explain what constitutes "enough of a basis," the court of appeals stated that it would require sufficient evidence to show a " 'good reason' to fear future persecution" (*ibid.* (quoting *Carvajal-Munoz*, 743 F.2d at 574)). The court failed, however, to address the Board's conclusion that the "good reason" standard "do[es] not reflect the generally understood meaning of 'well-founded' * * * [or] reflect the understanding of Congress, and the meaning of the Protocol, that an alien must show it is likely he will become a victim of persecution before he is eligible for refuge" (App., *infra*, 53a).

3. The decision below, if permitted to stand, will impose a substantial administrative burden on the Board and on the Immigration and Naturalization Service. It will render thousands of denials of asylum in cases decided since 1980 subject to attack on motions to reopen and will cloud the adjudication of the thousands of asylum cases that are currently undergoing initial administrative evaluation and review.[10] Moreover, the conflict in the courts of appeals will result in the disparate treatment of aliens seeking asylum in different parts of the country. Such a significant decision as whether or not an alien obtains asylum should not depend on the happenstance of the circuit in which he seeks review. In *Stevic*, the Court noted (slip op. 5) the importance of the question of the proper burden of proof for an alien seeking to avoid deportation on the ground of persecution. That question, which the Court expressly (*id.* at 17, 22) left unanswered with respect to requests for asylum, is no less important now.

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[10] We are informed that over 11,000 asylum applications were filed with the Executive Office for Immigration Review during the past fiscal year.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1985

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-7777

I&NS NO. A 24 420 980

LUZ MARINA CARDOZA-FONSECA, PETITIONER

vs.

U.S. IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

No. 84-7593

I&NS NO. A 23 108 407

FRANCISCA ROSA ARGUELLO-SALGUERA, PETITIONER

vs.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Appeals from Orders of the
Board of Immigration Appeals

No. 83-7777—Argued and Submitted June 10, 1985
No. 84-7593—Argued and Submitted June 13, 1985
San Francisco, California

[Filed Aug. 12, 1985]

[As amended Aug. 23, 1985]

OPINION

Before: SKOPIL, REINHARDT, and HALL, Circuit Judges

REINHARDT, Circuit Judge:

In both these cases the Board of Immigration Appeals applied an incorrect legal standard when it determined that the petitioners failed to establish their eligibility for asylum under section 208(a) of the Refugee Act of 1980, 8 U.S.C. § 1158(a) (1982). Rather than applying the "well-founded fear" standard, which governs asylum determinations, the Board applied the "clear probability" standard, which governs prohibitions against deportation under section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h). Because the Board failed to apply the correct legal standard in evaluating the petitioners' claims, we reverse the Board's orders denying asylum and remand for reconsideration. In addition, the Board failed clearly to articulate the basis for its refusal to grant Arguello-Salguera relief under section 243(h). We reverse that determination as well.

I. *FACTS*

A. *Cardoza-Fonseca*

Petitioner Luz Marina Cardoza-Fonseca is a citizen of Nicaragua who entered this country as a nonimmigrant visitor on June 25, 1979. She remained beyond her authorized stay and the INS initiated deportation proceedings. At her deportation hearing on

December 14, 1981, Cardoza-Fonseca conceded that she was otherwise deportable and applied for asylum under section 208(a) of the Refugee Act of 1980, 8 U.S.C. § 1158(a) (1982), and for a prohibition against deportation under section 234(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h) (1982).[1] The immigration judge applied only a "clear probability of persecution" standard and determined that Cardoza-Fonseca was not entitled to relief from deportation. The BIA affirmed, stating that no matter what burden of proof Cardoza-Fonseca faced, whether " 'clear probability,' 'good reason' or 'realistic likelihood,' " all of which the Board thought to be identical, she failed to show that she "*would* suffer persecution" (emphasis added). The Board also reasoned that her claim failed because she had not introduced any objective evidence to demonstrate that she "*will* be subject to persecution" (emphasis added). Cardoza-Fonseca appeals only from the denial of her claim for relief under section 208(a).

B. *Arguello-Salguera*

Petitioner Francisca Rosa Arguello-Salguera is a Nicaraguan citizen who entered the United States without inspection on March 15, 1980. At her first deportation hearing on March 27, 1980, she was granted permission to apply for asylum and a prohibi-

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[1] Requests for asylum under § 208(a), when made after the initiation of deportation proceedings, are also considered as requests for a prohibition against deportation under § 243(h). *See* 8 C.F.R. § 208.3(b) (1984). The benefits granted under the two forms of relief differ somewhat. In particular, an alien who is granted asylum has an automatic right after one year to apply for adjustment of status to permanent resident alien. *See* 8 C.F.R. § 209.2 (1984).

tion against deportation. At her second deportation hearing on September 10, 1981, she conceded deportability. After a third hearing on October 1, 1982, the immigration judge determined that Arguello-Salguera was a credible witness who presented believable testimony and that she had demonstrated both a clear probability and a well-founded fear of persecution. Accordingly, he concluded that the Attorney General was prohibited from deporting her and he granted her request for asylum. The BIA reversed, applying only the clear probability test and concluding that Arguello-Salguera had "failed to show that she *would* be persecuted" if she returned to Nicaragua (emphasis added). Arguello-Salguera appeals from the denial of her claims for relief under both section 208(a) and section 243(h).[2]

II. *THE ASYLUM CLAIMS*

A. *The Legal Standard*

Section 208(a) of the Refugee Act gives the Attorney General discretionary authority to grant

[2] Arguello-Salguera also appeals from the Board's summary denial of her motion to dismiss the INS's appeal of the immigration judge's decision on the grounds that the appeal was dilatory, inadequate, and frivolous. She also appeals the Board's denial of her request for voluntary departure. We affirm the Board's denial of the motion to dismiss the INS's appeal. Unlike the notice of appeal in *Matter of Holquin*, 13 I&N 423, 425 (BIA 1969), on which petitioner relies, the INS's notice of appeal in this case gave sufficient notice of the basis for the appeal to preclude us from determining that the Board erred in denying the motion. Because of the decision we reach regarding Arguello-Salguera's § 208 (a) and § 243(h) claims, we need not consider whether the Board abused its discretion, *see* 8 U.S.C. § 1254(e) (1982), in denying voluntary departure.

asylum to any alien who qualifies as a refugee under section 101(a)(42)(A) of that Act. Refugees are those persons outside their native country who cannot return because of "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (1982). Although the Attorney General has *discretion* to grant asylum to refugees, the determination of refugee status depends on *factual findings*. *INS v. Stevic*, 104 S. Ct. 2489, 2497 n.18 (1984); *Espinoza-Martinez v. INS*, 754 F.2d 1536, 1539 (9th Cir. 1985); *Bolanos-Hernandez v. INS*, 749 F.2d 1316 (9th Cir. 1984); *Carvajal-Munoz v. INS*, 743 F.2d 562, 567 (7th Cir. 1984).

The plain terms of section 208(a) require applicants for asylum to demonstrate a "well-founded fear" of persecution. In both of the cases before us the government contends that the "well-founded fear" standard is equivalent to the "clear probability of persecution" standard. This has consistently been the Board's position. *See, e.g., Matter of Acosta*, Interim Dec. No. 2986, slip op. at 25 (BIA March 1, 1985); *Matter of Salim*, 18 I&N Dec. 311, 314 (BIA 1982); *Matter of Lam*, 18 I&N Dec. 15 (BIA 1981); *Matter of Dunar*, 14 I&N Dec. 310, 319-20 (BIA 1973). The "clear probability" standard that the Board finds appropriate for the disposition of asylum cases is in fact applicable to claims for prohibition against deportation under section 243(h), *see Stevic*, 104 S. Ct. at 2501; *Espinoza-Martinez*, 754 F.2d at 1539; *Bolanos-Hernandez*, 749 F.2d at 1320; *Carvajal-Munoz*, 743 F.2d at 568, and not to section 208(a) asylum claims.

Prior to the Supreme Court's decision in *Stevic*, there was considerable confusion over whether the

"clear probability" standard differed from the "well-founded fear" standard. Many circuit courts had simply assumed that the criteria for eligibility for a grant of asylum under section 208(a) were identical to those for a prohibition of deportation under section 243(h). *See Bolanos-Hernandez*, 749 F.2d at 1321 n.10 (listing cases and explaining that some courts applied "clear probability" standard to all claims, while others applied "well-founded fear" standard to all claims). However, in *Stevic* the Court, while not deciding the question, clearly alerted the circuit courts and the Board to the distinct possibility that there is a significant difference between the two tests. The Court expressly assumed, for purposes of the case before it, that the "well-founded fear" standard" applicable in asylum cases is "more generous" than the "clear probability of persecution" standard. 104 S. Ct. at 2498.

Following *Stevic*, we, along with the Sixth and Seventh Circuits, unequivocally held that the "well-founded fear" standard is, in fact, "more generous" than the "clear probability" standard. *See Argueta v. INS*, 759 F.2d 1395, 1396-97 (9th Cir. 1985); *Bolanos-Hernandez*, 749 F.2d at 1321 (9th Cir. 1984); *accord Youkhanna v. INS*, 749 F.2d 360, 362 (6th Cir. 1984); *Carvajal-Munoz*, 743 F.2d at 574-75. We noted that a recognition of the difference between the standards comports with the structure of the Immigration Act. We said that there is a valid reason for applying a stricter standard where an alien claims he or she is entitled to a mandatory prohibition against deportation than where that person is asking only that he or she be found eligible for consideration for a grant of asylum, a grant that ultimately will be made or denied by the Attorney

General in the exercise of his discretion. *Bolanos-Hernandez*, 749 F.2d at 1321-22; *accord Carvajal-Munoz*, 743 F.2d at 575.

In *Bolanos-Hernandez* we discussed the meaning of the "clear probability" test. We said, " '[t]he question under [the section 243(h)] standard is whether it is more likely than not that the alien would be subject to persecution.' " 749 F.2d at 1320 (quoting *Stevic*, 104 S. Ct. at 2498). We concluded that general evidence of widespread conditions of violence in a country is not in itself sufficient to establish a clear probability of persecution, *id.* at 1323 (citing *Zepeda-Melendez v. INS*, 741 F.2d 285, 290 (9th Cir. 1984)), and that there must be some evidence that (1) the applicant or those similarly situated are at greater risk than the general population, *see id.* at 1323, and (2) that the threat to the applicant is a serious one, *id.* at 1324.[3]

It is apparent from the very words of the statute that the burden under the asylum section (section 208(a)) is not identical to the prohibition-against-deportation (section 243(h)) burden that we have just described. In order to qualify for relief under section 243(h), an alien must introduce evidence demonstrating that his or her "life or freedom" would be threatened, 8 U.S.C. § 1253(h) (1982). It is this

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[3] Although independent corroborative evidence of the threat is not necessary, *Bolanos-Hernandez*, 749 F.2d at 1324, the applicant must introduce some evidence that supports the contention that "the group making the threat has the will or ability to carry it out," *id.* We found that Bolanos-Hernandez's unrefuted credible testimony about a specific, serious threat, supported by documentary evidence that demonstrated that the group that made the threat had in the past carried out violence of the sort threatened, was sufficient to establish a likelihood of persecution.

statutory test that the courts have held is met by demonstrating a "clear probability of persecution." In contrast, the statutory section that specifies the burden an alien must meet in order to qualify as a refugee (and thus be eligible for consideration under the asylum provision) does not restrict the harm for which relief may be granted to a threat to "life or freedom." In the case of the refugee provision, the statute itself uses the phrase "persecution," 8 U.S.C. § 1101(a)(42)(A) (1982), which the Supreme Court has noted is "a seemingly broader concept than threats to 'life or freedom.'" *Stevic*, 104 S. Ct. at 2500 n.22. In fact, we have ourselves previously made it clear that the statutory term "persecution" includes more than just restrictions on life and liberty; the term encompasses "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive." *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969); *accord Bolanos-Hernandez*, 749 F.2d at 1322 n.13. Accordingly, the statutory term "persecution" in the "well-founded fear of persecution" standard encompasses more than the statutory term "threat to life or freedom" and thus more than the non-statutory term "persecution" used in the judicially established "clear probability of persecution" test.

The difference in language between the standards used in asylum and prohibition-against-deportation cases makes another important contrast between the two tests apparent. The term "well-founded fear" refers to a subjective state of mind, while "clear probability" refers to an objective fact. The latter phrase requires an examination of the objective realities, while the former requires an analysis of the applicant's mental state (notwithstanding the fact

that the fear must have some objective basis if we are ultimately to find it well-founded). *See Bolanos-Hernanez*, 749 F.2d at 1321.

There is a significant practical consequence to the fact that different analyses are required under the two standards. The term "clear probability" requires a showing that there is a greater-than-fifty-percent chance of persecution. In contrast, the term "well-founded fear" requires that (1) the alien have a subjective fear, and (2) that this fear have enough of a basis that it can be considered well-founded. While in the latter case there must be some objective basis for the fear, contrary to the requirement of the "clear probability" test the likelihood of persecution need not be greater than fifty percent.

We have not previously described in any detail the amount and type of evidence required to establish that a fear is "well-founded." Fortunately, however, the Seventh Circuit has done so. In *Carvajal-Munoz*, the Seventh Circuit said that asylum applicants must present "specific facts" through objective evidence to prove either past persecution or "good reason" to fear future persecution. *Carvajal-Munoz*, 743 F.2d at 574. Documentary evidence of past persecution or a threat of future persecution will usually suffice to form the "objective" component of the evidence requirement. However, as the Seventh Circuit noted, refugees sometimes are in no position to gather documentary evidence establishing specific or individual persecution or a threat of such persecution. *See Carvajal-Munoz*, 743 F.2d at 574; *accord Bolanos-Hernandez*, 749 F.2d at 1323-24; *McMullen v. INS*, 658 F.2d 1312, 1319 (9th Cir. 1981). Accordingly, if documentary evidence is not available, the appli-

cant's testimony will suffice if it is credible, persuasive, and refers to "*specific* facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds" listed in section 208(a). *See Carvajal-Munoz*, 743 F.2d at 574 (emphasis in original); *McMullen*, 658 F.2d at 1318 (great length and concreteness of alien's testimony held sufficient to establish a likelihood of persecution); *Matter of Sihasale*, 11 I&N Dec. 759, 762 (BIA 1966) (petitioner's "own testimony may be the best—in fact the only—evidence available to her").[4]

Contrary to the government's argument, the approach we have described, which was first articulated by the Seventh Circuit in *Carvajal-Munoz* and subsequently endorsed by us in *Bolanos-Hernandez*, does not render the well-founded fear standard entirely subjective. Applicants must point to specific, objective facts that support an inference of past persecution or risk of future persecution. That the objective facts are established through the credible and persuasive testimony of the applicant does not make those facts less objective. "Mere assertions of possible

[4] This standard accords with the standard used in assessing refugee admissions under former § 203(a)(7) of the Immigration Act, one of the predecessors of § 208(a). *See Carvajal-Munoz*, 743 F.2d at 574. Section 203(a)(7) gave the Attorney General discretion to allow entry of persons fleeing Communist nations or the Middle East because of fear of persecution "on account of race, religion, or political opinion." To obtain relief under § 203(a)(7), aliens had to demonstrate "good reason" to fear persecution by means of "credible testimony or other evidence." *Matter of Ugricic*, 14 I&N Dec. 384, 385-86 (1972).

fear" are still insufficient. *Shoaee v. INS*, 704 F.2d 1079, 1084 (9th Cir. 1983). It is only after objective evidence sufficient to suggest a risk of persecution has been introduced that the alien's subjective fears and desire to avoid the risk-laden situation in his or her native land become relevant.

B. *The Application of the Legal Standard in These Cases*

Despite the fact that we have held that the "clear probability" and "well-founded fear" standards are not identical, our clear articulation of the stricter "clear probability" standard and the voluminous guidance available to assist in construction of the "more generous" "well-founded fear" standard, the Board continues to maintain that the "well-founded fear" standard and the "clear probability of persecution" standard are, in practice, identical. In *Matter of Acosta*, Interim Dec. No. 2986 (BIA March 1, 1985), the Board again did so, although acknowledging that the Sixth, Seventh, and Ninth Circuits have squarely ruled to the contrary. Slip op. at 23.[5] In

[5] Although not necessary to its holding, the Third Circuit has recently adopted the Board's position that the alien must show a clear probability of persecution to be entitled to relief under § 208(a) or § 243(h). *See Sotto v. United States INS*, 748 F.2d 832, 836 (3d Cir. 1984). In *Sotto* the Third Circuit reversed the Board's decision denying the alien § 208(a) and § 243(h) relief because the Board had failed to consider relevant evidence. *Id.* at 838. Nevertheless, the court felt that an earlier, pre-*Stevic* decision, in which it had concluded that the "well-founded fear" and "clear probability" standards were identical, constrained its conclusion regarding the appropriate burden of proof.

this respect the Board appears to feel that it is exempt from the holding of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and not constrained by circuit court opinions. In *Acosta* it concluded that notwithstanding the law as declared by the Sixth, Seventh, and Ninth Circuits "the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge." Slip op. at 25. Here, the Board applied its own construction of the applicant's burden of proof in an asylum case to the claims of both Cardoza-Fonseca and Arguello-Salguera. It held that they were required to demonstrate a clear probability of persecution in order to be declared eligible for asylum.

In Cardoza-Fonseca's case, the immigration judge explicitly stated that he used only the clear probability standard. The Board held, consistent with its position in *Acosta*, that "good reason" or "realistic likelihood" [6] meant no more and no less than "clear probability." The Board then proceeded to evaluate Cardoza-Fonseca's asylum application under the more-likely-than-not (clear probability) standard. It concluded that Cardoza-Fonseca failed to meet her burden of proof. The government's brief on appeal similarly asserts that there is "no difference of substance between a 'well-founded fear of persecution' and a 'clear probability of persecution.'"

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[6] We need not decide whether the phrase "good reason" could be synonymous with "well-founded fear." In either event, it is clear from the standards applied to Cardoza-Fonseca's claim, as well as from its position in *Lam*, in *Acosta*, in its briefs, and at oral argument, that the Board did not apply the "well-founded fear" standard.

In Arguello-Salguera's case the Board cited both the asylum section, section 208(a), and the prohibition against deportation section, section 243(h), but articulated only one standard of proof, the stricter "clear probability" standard. It then considered whether the petitioner had demonstrated that she "would" be persecuted. Without any explanation, it concluded that she did not have "a fear of persecution" and had not demonstrated that "she would be singeled (sic) out for persecution." The government's appellate brief in this case concedes that the Board applied the same strict standard to both of the petitioner's claims and argued once again that "the BIA's determination that the burden of proof in asylum and [prohibition] of deportation cases is identical should be upheld." At oral argument, counsel for the government frankly acknowledged that the Board did not apply the law of our circuit in either of the cases before us and that it continues to refuse to apply that law.

It is beyond question that under the law of our circuit, as well as others, the Board erred in applying the strict "clear probability" standard to petitioners' asylum claims. This is not an error we can remedy on appeal. "[A]n agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 397 (1974) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962)); *accord American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 539 (1981); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). This rule applies to decisions by the Board of Immigration Appeals just as it applies to other

agency determinations. *See Phinpathya v. INS*, 673 F.2d 1013, 1020 (9th Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 584 (1984); *Patel v. INS*, 638 F.2d 1199, 1201 (9th Cir. 1980); *Castillo-Felix v. INS*, 601 F.2d 459, 462 n.6 (9th Cir. 1979); *Waziri v. INS*, 392 F.2d 55, 57 (9th Cir. 1968).

We do not believe that we should attempt to apply the "well-founded fear" standard to the instant claims before the Board has performed that task itself. Cases in which the Board applies too strict a standard and denies relief on that basis must be returned to the Board for reconsideration and not adjudicated *de novo* by the courts. Accordingly, we reverse and remand the Board's determinations regarding the asylum claims so that the Board may evaluate those claims under the proper legal standard.

III. *ARGUELLO-SALGUERA'S SECTION 243(h) CLAIM*

The immigration judge observed Arguello-Salguera over the course of three deportation hearings and explicitly determined both that she was credible and that her evidence was sufficient to establish both a well-founded fear and a clear probability of persecution. Nevertheless, the Board rejected her claims. In doing so, the Board merely restated what Arguello-Salguera's evidence consisted of, and what sorts of facts she had not established. We cannot determine from its opinion whether, despite the immigration judge's express credibility findings, the Board found that Arguello-Salguera's story was not credible, or whether it accepted her testimony as truthful and believable but nevertheless found the evidence legally insufficient to establish a clear probability of persecution.

As the government points out, the Board has the power to review the record *de novo* and make its own findings of fact. *See Noverola-Bolaina v. INS*, 395 F.2d 131 (9th Cir. 1968). The Board also has the right to disagree with the immigration judge's credibility findings. *See McMullen*, 658 F.2d at 1318. Similarly, the Board may determine that the evidence is legally insufficient, despite an immigration judge's contrary determination.

Nevertheless, in order for us properly to review the Board's determination, we must understand the basis for its decision and how it arrived at the findings underlying that decision. *See Conteras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983); *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981). If the findings of the immigration judge and the Board conflict, we will consider the judge's findings as well as the Board's. *McMullen*, 658 F.2d at 1318 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), for the proposition that evidence in support of the Board's conclusion may be considered less persuasive if examiner who observed witness drew conclusions different than Board's); *cf. Saballo-Cortez v. INS*, 761 F.2d 1259, 1266 (9th Cir. 1985) (we defer to immigration judge's negative credibility findings if supported by the record). However, we cannot tell how to view the credibility issue nor can we properly determine whether the Board's decision is supported by substantial evidence, *see Bolanos-Hernandez*, 749 F.2d at 1320 n.8; *Saballo-Cortez*, 761 F.2d at 1262, unless we understand the Board's findings and its reasons for denying relief.

Because we cannot determine from the Board's opinion whether its conclusion that Arguello-Salguera failed to satisfy the requirements for relief under

section 243(h) was based on its independent, implicit negative credibility findings or reflected some legal determination it made after accepting the immigration judge's credibility findings, we must remand her prohibition against deportation claim for clarification of the Board's opinion.

REVERSED AND REMANDED

APPENDIX B

BOARD OF IMMIGRATION APPEALS
Washington, D.C. 20530

File: A24 420 980--San Francisco

In re: LUZ MARINA CARDOZA-FONSECA

IN DEPORTATION PROCEEDINGS

APPEAL

[Filed: Sept. 21, 1983]

CHARGE:

Order:

Sec. 241(a)(2), I&N Act [8 U.S.C. 1251(a)(2)]—Nonimmigrant—remained longer than permitted

APPLICATION: Asylum; withholding of deportation

The respondent appeals from a decision of an immigration judge dated December 14, 1981, finding her deportable under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2) and denying her application for asylum and withholding of deportation under section 208(a) and

243(h) of the Act, 8 U.S.C. 1158(a) and 8 U.S.C. 1253(h). The appeal will be dismissed.

The respondent is a 33-year-old native and citizen of Nicaragua who, at deportation proceedings conducted on December 14, 1981, conceded deportability under section 241(a)(2) of the Act, 8 U.S.C. 1251 (a)(2), as a nonimmigrant who had remained longer than permitted. We find that deportability has been established by clear, convincing, and unequivocal evidence as required by *Woodby* v. *INS*, 385 U.S. 276 (1966), and 8 C.F.R. 242.14(a). The only issue presented on appeal is the respondent's eligibility for temporary withholding of deportation and political asylum.

The law is well-settled that an applicant bears the burden of proof in asylum and section 243(h) proceedings to establish that her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion. *See* section 101(a)(42)(A) of the Act, 8 U.S.C. 1101(a)(42)(A); section 243(h) of the Act; *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023 (5 Cir. 1982); *Fleurinor* v. *INS*, 585 F.2d 129 (5 Cir. 1978); *Matter of Exilus*, Interim Decision 2914 (BIA 1982); *Matter of Lam*, Interim Decision 2857 (BIA 1981); *Matter of Dunar*, 14 I&N Dec. 310 (BIA 1973).

On appeal, the respondent asserts that the immigration judge applied the wrong legal standard in arriving at his decision that she had failed to sustain her burden of proving a likelihood of persecution in Nicaragua. She relies on the case of *Stevic* v. *Sava*, 678 F.2d 401 (2 Cir. 1982), to support her contention that the appropriate legal standard for sustaining an asylum claim is a "well-founded fear of persecution" rather than a "clear probability of persecu-

tion". She asserts that pursuant to the United Nations *Handbook on Procedures and Criteria for Determining Refugee Status* (September 1979), an alien who demonstrates a genuine, subjective fear of persecution, based on some objective evidence, has established a well-founded fear of persecution. The *Handbook* is also cited as authority for her contention that her fear of persecution need not necessarily be based on her own personal experiences but may instead be based on what happened to her brother, Orlando Cardozo Fonseca. The respondent maintains that the evidence and testimony presented to the immigration judge relating to her brother's extensive political problems with the Sandinistas and her close identification with him, demonstrate a well-founded fear of persecution. She urges that the immigration judge's decision be reversed and asylum as well as temporary withholding of deportation be granted.

At her deportation hearing, the respondent alleged that she feared persecution and reprisal in Nicaragua based on her brother's numerous problems with the Sandinistas. The respondent's brother testified at the hearing that during Somoza's regime he was an active participant in the Sandinista's struggle to power. He stated that as the second in command in his area he was responsible for the organization and training of Sandinista supporters in Mexico, Costa Rica, Honduras and Panama and that many of these supporters are now in jail. For some unexplained reason, the respondent's brother claimed that he was denounced by his fellow Sandinistas and thus brought to the attention of Somozan officials. As a result of this denouncement he was falsely accused of killing a general and imprisoned and interrogated by Somozan officials, first in 1969, and then in 1971, 1973, and

1978. During the 1978 interrogation, which lasted 18 days, the respondent's brother informed the Somozan officials that he no longer sympathized with the Sandinistas since they appeared to be leaning towards Communism, a doctrine he did not espouse. It is claimed that his captors applied various methods of torture to him, including electric shocks to his eyes and genitals.

The respondent's brother testified that he had submitted an application for asylum. Attached to this application was an article from *La Frensa*, a Nicaraguan newspaper, dated March 28, 1978, which recounts his seizure by government officials on March 10th and his subsequent disappearance. Although he indicated that both his father-in-law and brother-in-law were in prison and that he feared for his own safety, the respondent's brother admitted that he returned to Nicaragua in 1980 for approximately 15 days in order to see his family. He maintained that his visit was clandestine and that his only movements were at night. He further contended that during his 15 day sojourn in Nicaragua, someone approached his home on at least two occasions and requested information as to his whereabouts.

The respondent's brother testified that he feared for the respondent's safety if she returns to Nicaragua. He indicated that he believed the Sandinistas would imprison and interrogate her in order to locate him, especially since they are aware that she and her brother fled Nicaragua together.

The respondent verified her brother's history of imprisonment and political problems with the Sandinistas. She maintains that although she herself has not taken any actions against the Sandinistas, her brother's actions will count against her. She claims

that her sister, who remains in Nicaragua, has urged her not to return home because the Sandinistas are looking for their brother. She asserts that if she returned home she, too, would be placed in jail and tortured.

Upon consideration of the record as a whole, we agree with the immigration judge that the respondent has failed to establish that she would suffer persecution within the meaning of section 208(a) or 243(h) of the Immigration and Nationality Act. Our conclusion as to the respondent's claim is the same whether we apply a standard of "clear probability", "good reason", or "realistic likelihood". *See Rejaie* v. *INS*, 691 F.2d 139 (3 Cir. 1982); *Stevic* v. *Sava*, *supra*. *Matter of Martinez-Romero*, Interim Decision 2872 (BIA 1981). We recognize the difficulty an individual may face in establishing that she will be persecuted. We are also aware of the political upheaval and general anarchy existing in Nicaragua. However, generalized, undocumented assertions of persecution, standing alone are not sufficient to establish eligibility for asylum or withholding of deportation. *See Rejaie* v. *INS*, *supra; Kashani* v. *INS*, 547 F.2d 376 (7 Cir. 1977); *see also Moghanian* v. *BIA*, 577 F.2d 141 (9 Cir. 1978); *Pereira-Diaz* v. *INS*, 551 F.2d 1149 (9 Cir. 1977). Similarly, general allegations of political upheaval which affect the populace as a whole are insufficient for such relief. *Fleurinor* v. *INS*, *supra*; *Matter of Diaz*, 10 I&N Dec. 199 (BIA 1963).

The respondent has failed to support, through objective evidence, her generalized assertion that she will be subject to persecution based on her brother's political problems with the Sandinistas. Even assuming her brother's recital of his treatment at the hands

of the Sandinistas to be true, it is the respondent's case which is now before us, not her brother's. The respondent has openly admitted that she herself has taken no actions against the Nicaraguan government. She admits that she has never been politically active. She testified that she never assisted her brother in any of his political activities. Moreover, she admits that she has never been singled out for persecution by the present government. Thus, her sole basis for requesting asylum is that the Sandinistas will associate her with her brother and attempt to use her to retaliate against him.

We note that the respondent's sister who remains in Nicaragua, has not been harmed by the Sandinistas. In fact, the respondent stated in her asylum application that no member of her family has suffered or been intimidated because of her actions. We are unpersuaded that the respondent's fears of retaliation, based solely on her claimed close relationship to her brother and her flight from Nicaragua with him, amount to anything more than mere speculation.

On the basis of the record, we are satisfied that the respondent has not shown that she will be persecuted or that she has a well-founded fear of persecution within the contemplation of section 208(a) or 243(h) of the Act. Consequently, the respondent's appeal from the denial of her application for asylum under section 243(h) of the Act will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that

time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ David L. Milhollan
Chairman

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A24 420 980—San Francisco, California

In the Matter of

LUZ MARINA CARDOZA-FONSECA, RESPONDENT

Dec. 14, 1981

IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act—Section 241(a)(2)—nonimmigrant remained longer

APPLICATION: Asylum and 243(h) or voluntary departure

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 33-year-old single female native citizen of Nicaragua. She entered the United States at Miami, Florida on or about June 25, 1979 as a visitor until September 30, 1979. She was granted the privilege of departing the United States voluntarily on or before September 28, 1980. She failed to depart.

Deportability has been conceded and I find that the respondent is deportable as charged. The respondent has applied for asylum and 243 relief or voluntary departure as an alternative remedy. Her claim to persecution is basically founded on that of her brother who has an asylum application before the District Director. His application is on the record as part of hers. See Exhibit 2.

The brother, Orlando Cardoza Fonseca, was called as a witness at this hearing. He testified that he was arrested, interrogated and tortured in 1969, 1971, 1973 and 1978 by the government authorities then in power in Nicaragua, that is the Somoza regime. He claims that he received electric shock through his eye and genitals in an effort to make him speak out. The last time when he was imprisoned, he was in prison for 18 days. He was at that time a member of the Sandinista movement but claims that he is no longer involved with that party or sympathetic to its ends. He feels that he would be persecuted because he was turned in, in 1978 by fellow members of the Sandinista movment to the Somoza regime. It is unclear why this happened or whether these persons were in fact sympathetic to the Sandinista movement. He therefore believes that the Sandinistas would persecute him if he returned to Nicaragua. He claims that his wife has recently been called upon by the

Sandinista authorities and questioned as to his whereabouts. He, however, also testified he returned to Nicaragua last year and visited with his family for two weeks. He further testified that he was there incognito.

Two of his relatives are presently imprisoned in Nicaragua. They were members of the Somoza government. While last in prison he stated that he was no longer in sympathy with the Sandinistas to his interrogators. He also feels that this may have been disclosed to the Sandinista regime which would further cause him to be persecuted if he returned to his country.

I am reluctant to pass on the strength of the brother's application for asylum since that is not before me at this time. His parents, two sisters, his wife and two children, all [*sic*] of them have been arrested or interrogated.

The real question is whether the respondent is likely to be persecuted if returned to her native country. An alien qualifies for asylum under the Refugee Act of 1980 if it is established that he or she is a refugee within the meaning of Section 101(a)(42)(A) of the Immigration and Nationality Act, that is that he or she has a well-founded fear of persecution in the country of his or her nationality or the country where he or she last resided, on account of race, religion, nationality, membership in a particular social group or political opinion. Of necessity, finding that an alien's life or freedom would be threatened under section 243(h) would lead to the conclusion that they are also likely to be persecuted or that they have a well-founded fear of persecution in that country for asylum purposes.

Respondent's testimony is that she was a nonpolitical person. Nonetheless she feels that she would be interrogated and possibly tortured because of her brother's activity. Her sisters warned her not to return to her country because the Sandinistas are looking for the brother who was a witness at her hearing today.

Without making a determination as to the strength of the brother's application for asylum, it is my conclusion that the respondent, based on the brother's application for asylum, has not demonstrated sufficient evidence in support of her claim of persecution. It is necessary for the respondent under her circumstances to show a clear probability of persecution directed to her individually or to a class to which she belongs. There is no evidence of any substance in the record other than her brother's claim to asylum in the form of his application and a newspaper article covering his imprisonment in 1978.

None of the evidence indicates that the respondent would be persecuted for political beliefs, whatever they may be, or because she belongs to a particular social group. She has not proven that she or any other members of her family, other than her brother, has been detained, interrogated, arrested and imprisoned, tortured and convicted and sentenced by the regime presently in power in Nicaragua.

I find that she has failed to demonstrate that she is entitled to political asylum or relief pursuant to section 243(h). Accordingly her application for relief is hereby denied. The respondent has in the alternative applied for voluntary departure. There appears to be no reason why she should not be given that form of relief.

IT IS ORDERED that in lieu of an order of deportation the respondent be granted voluntary departure on or before March 14, 1982, without expense to the Government or any extension beyond that date as may be granted by the District Director under the conditions he may set.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceeding and the following order shall thereupon become immediately effective: The respondent shall be deported from the United States to Nicaragua on the charge contained in the Order to Show Cause.

June 1, 1982

/s/ Bernard J. Hornbach
BERNARD J. HORNBACH
United States Immigration Judge

APPENDIX D

EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
Board of Immigration Appeals
Falls Church, Virginia 22041

File: A24 159 781—New Orleans

In re: GILBERTO ACOSTA-SOLORZANO

IN DEPORTATION PROCEEDINGS

APPEAL

Mar. 1, 1985

CHARGE:

Order: Sec. 241(a)(2), I&N [8 U.S.C. § 1251 (a)(2)]—Entered without inspection

APPLICATION: Asylum and withholding of deportation

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

In a decision dated December 22, 1983, the immigration judge found the respondent deportable pursuant to section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2), for entering the United States without inspection, denied the respondent's applications for a grant of asylum and for withholding of deportation to El Salvador, but granted the respondent the privilege of departing voluntarily in lieu of deportation. The respondent has appealed from that portion of the immigration judge's decision denying the applications for asylum and withholding of deportation. The appeal will be dismissed.

The respondent is a 36-year-old male native and citizen of El Salvador. In a deportation hearing held before an immigration judge over the course of two days in July and August 1983, the respondent conceded his deportability for entering the United States without inspection and accordingly was found deportable as charged. The respondent sought relief from deportation by applying for a discretionary grant of asylum pursuant to section 208 of the Act, 8 U.S.C. § 1158, and for mandatory withholding of deportation to El Salvador pursuant to section 243(h) of the Act, 8 U.S.C. § 1253(h).[1] In an oral decision, the immigration judge denied the respondent's applications for these two forms of relief finding that he had failed to meet his burden of proof for such relief. It is this finding that the respondent has challenged on appeal.

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[1] Under the regulations of the Immigration and Naturalization Service, any asylum request made after the institution of deportation proceedings is also considered to be a request for withholding of deportation under section 243(h) of the Act. 8 C.F.R. § 208.3(b) (1984).

In order to be eligible for withholding of deportation to any country, an alien must show that his "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Secton 243(h)(1) of the Act. We have held, and the United States Supreme Court has recently affirmed, that this statutory provision requires an alien to demonstrate "a clear probability" of persecution on account of one of the five grounds enumerated in the Act. *INS* v. *Stevic*, —— U.S. ——, 104 S. Ct. 2489 (1984). The Court has construed the clear-probability standard to require a showing that it is more likely than not an alien would be subject to persecution. *Id.* at 2498.

In order to be eligible for a grant of asylum, an alien must show he or she is a "refugee" as defined by section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A). *See* section 208 of the Act. That definition includes the requirement that an alien must have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *See* section 101(a)(42)(A) of the Act. In *INS* v. *Stevic*, *supra*, the Supreme Court did not find it necessary to construe the meaning of the phrase "well-founded fear of persecution." Rather, the Court assumed for the purposes of analysis that the well-founded-fear standard for asylum is more generous than the clear-probability standard for withholding of deportation. *INS* v. *Stevic*, *supra*, at 2498.

It has been our position that as a practical matter the showing contemplated by the phrase "a well-founded fear" of persecution converges with the showing described by the phrase "a clear probability" of persecution. *See e.g.*, *Kashani* v. *INS*, 547 F.2d 376,

379 (7th Cir. 1977); *Matter of Dunar*, 14 I&N Dec. 310, 319-20 (BIA 1973). Accordingly we have not found a significant difference between the showings required for asylum and withholding of deportation. *Matter of Salim*, 18 I&N Dec. 311, 314 (1982); *Matter of Lam*, 18 I&N Dec. 15 (1981); *accord Matter of Portales*, 18 I&N Dec. 239, 241 (BIA 1982).

The United States Court of Appeals for the Third Circuit has agreed with this position, holding that there is no difference between the standards for asylum and withholding of deportation. *Sotto* v. *INS*, 748 F.2d 832, 836 (3d Cir. 1984); *see Rejaie* v. *INS*, 691 F.2d 139, 146 (3d Cir. 1982). The Seventh Circuit has concluded that the well-founded-fear standard for asylum is not identical, but "very similar," to the clear-probability standard for withholding of deportation and has described the showing for asylum as one requiring actual persecution or some other "good reason" to fear persecution. *Carvajal-Munoz* v. *INS*, 743 F.2d 562, 574-76 (7th Cir. 1984). This position also appears to have been adopted by the Sixth Circuit. *Youkhanna* v. *INS*, 749 F.2d 360, 362 (6th Cir. 1984). The Ninth Circuit, however, which has indicated that the well-founded-fear standard requires a "valid reason" to fear persecution, has concluded that this standard is more generous to the alien than the clear-probability standard for withholding of deportation. *Bolanos-Hernandez* v. *INS*, 749 F.2d 1316, 1321 (9th Cir. 1984). In light of the conflicting positions over the standards controlling asylum and withholding of deportation, we shall reexamine our position on the showings required for these forms of relief.

We begin with the understanding that an alien in an exclusion or a deportation proceeding who seeks to

demonstrate eligibility for either asylum or withholding of deportation must necessarily make two related showings. First, the alien must go forward with his evidence and initially persuade the immigration judge that the facts alleged to be the basis of the claim for asylum or withholding of deportation are true, *i.e.*, the alien must meet his evidentiary burdens of proof and persuasion. *See generally*, E. Cleary, *McCormick's Handbook of the Law of Evidence* § 336 at 783-85 (2d ed. 1975). Second, the alien must demonstrate that the facts found to be true meet the tests of eligibility for asylum or withholding of deportation set out in the Act, *i.e.*, the alien must meet the statutory standards of eligibility for these forms of relief. *See* sections 208 and 243(h) of the Act.

THE EVIDENTIARY BURDENS OF PROOF AND PERSUASION FOR ASYLUM AND WITHHOLDING OF DEPORTATION

Case law and the regulations have always made clear that it is the alien who bears the burden of proving that he would be subject to, or fears, persecution. *See INS* v. *Stevic*, *supra*, at 2497 n.14; 8 C.F.R. §§ 208.5, 242.17(c) (1984); *see also Matter of Nagy*, 11 I&N Dec. 888, 889 (BIA 1966); *Matter of Sihasale*, 11 I&N Dec. 759, 760-62 (BIA 1966). However, to date our decisions have not articulated the burden of persuasion an alien must meet in order to convince the trier-of-fact of the truth of the allegations that form the basis of the claim for asylum or withholding of deportation.

It is the general rule in both administrative and immigration law that the party charged with the burden of proof must establish the truth of his allegations by a preponderance of the evidence. *See* E.

Cleary, *supra*, § 355 at 853; 1A C. Gordon & M. Rosenfield, *Immigration Law and Procedure*, § 5.10b at 5-121 (rev. ed. 1984).[2] This is the burden of persuasion generally applied to aliens when they seek to prove their admissibility to the United States or when they seek relief from deportation through such means as suspension of deportation under section 244(a) of the Act, 8 U.S.C. § 1254(a), or adjustment of status under section 245 of the Act, 8 U.S.C. § 1255. *See Matter of Vorrais*, 12 I&N Dec. 84 (BIA 1967); 1A C. Gordon & H. Rosenfield, *supra*, §§ 3.20d at 3-190, 5.10b at 5-121. We see no reason to depart from this burden of persuasion when aliens seek asylum and withholding of deportation. Thus, in such cases we consider it to be incumbent upon an alien to establish the facts supporting his claim by a preponderance of the evidence.[3] *Cf. Bolanos-Hernandez* v. *INS*, *supra*, at 1320 n.5. In determining whether a preponderance of the evidence supports an alien's allegations, it is necessary to assess the credibility and the probative force of the evidence put forward by the alien. *See*,

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[2] The Service's burden of proving an alien's deportability by clear, unequivocal, and convincing evidence is an exception to this general rule. *See Woodby* v. *INS*, 385 U.S. 276 (1966).

[3] We note that in *McMullen* v. *INS*, 658 F.2d 1312, 1316 (9th Cir. 1981), the Ninth Circuit held that a "substantial evidence" standard of review applies in cases in which aliens seek withholding of deportation under section 243(h) of the Act. *See also Carvajal-Munox* v. *INS*, *supra*, at 567. The standard of review employed by a court in reviewing our decision is a separate and distinct standard from that imposed upon a party to measure his burden of persuasion on issues of fact. *Woodby* v. *INS*, *supra*, at 282-83. Thus, the Ninth Circuit's decision in *McMullen* has no bearing on the issue of an alien's burden of persuasion in withholding or asylum cases.

e.g. Saballo-Cortez v. *INS*, 749 F.2d 1354, 1357 (9th Cir. 1984).

In order to prove the facts underlying his applications for asylum and withholding of deportation, the respondent testified, and attested in an affidavit attached to his asylum application, to the following facts. In 1976 he, along with several other taxi drivers, founded COTAXI, a cooperative organization of taxi drivers of about 150 members. COTAXI was designed to enable its members to contribute the money they earned toward the purchase of their taxis. It was one of five taxi cooperatives in the city of San Salvador and one of many taxi cooperatives throughout the country of El Salvador. Between 1978 and 1981, the respondent held three management positions with COTAXI, the duties of which he described in detail, and his last position with the cooperative was that of general manager. He held that position from 1979 through February or March of 1981. During the time he was the general manger of COTAXI, the respondent continued on the weekends to work as a taxi driver.

Starting around 1978, COTAXI and its drivers began receiving phone calls and notes requesting them to participate in work stoppages. The requests were anonymous but the respondent and the other members of COTAXI believed them to be from anti-government guerrillas who had targeted small businesses in the transportation industry for work-stoppages, in hopes of damaging El Salvador's economy. COTAXI's board of directors refused to comply with the requests because its members wished to keep working, and as a result COTAXI received threats of retaliation. Over the course of several years, COTAXI was threatened about 15 times. The other taxi cooperatives in the city also received similar threats.

Beginning in about 1979, taxis were seized and burned, or used as barricades, and COTAXI drivers were assaulted or killed. Ultimately five members of COTAXI were killed in their taxis by unknown persons. Three of the COTAXI drivers who were killed were friends of the respondent and, like him, had been founders and officers of COTAXI. Each was killed after receiving an anonymous note threatening his life. One of these drivers, who died from injuries he sustained when he crashed his cab in order to avoid being shot by his passengers, told his friends before he died that three men identifying themselves as guerrillas had jumped into his taxi, demanded possession of his car, and announced they were going to kill him.

During January and February 1981, the respondent received three anonymous notes threatening his life. The first note, which was slipped through the window of his taxi and was addressed to the manager of COTAXI, stated: "Your turn has come, because you are a traitor." The second note, which was also put on the respondent's car, was directed to "the driver of Taxi No. 95," which was the car owned by the respondent, and warned: "You are on the black list." The third note was placed on the respondent's car in front of his home, was addressed to the manager of COTAXI, and stated: "We are going to execute you as a traitor." In February 1981, the respondent was beaten in his cab by three men who then warned him not to call the police and took his taxi. The respondent is of the opinion that the men who threatened his life and assaulted him were guerrillas who were seeking to disrupt transportation services in the city of San Salvador. He also has the impression, however, that COTAXI was not favored

by some government officials because they viewed the cooperative as being too socialistic.

After being assaulted and receiving the three threatening notes, the respondent left El Salvador because he feared for his life. He declared at the hearing that he would not work as a taxi driver if he returned to El Salvador because he understands that there is little work for taxi drivers now. He explained that the people are too poor to call taxis. Additionally, he stated that the terrorists are no longer active.

As evidence of the truth of his version of the facts, the respondent submitted a letter from the present manager of COTAXI, stating that the respondent was a member of that organization for 3 years. The respondent also submitted several articles reporting that leftist guerrillas had threatened to kill American advisors and personnel in El Salvador, had launched an offensive in three of the provinces in the country, and had engaged in a campaign designed to sabotage the transportation industry and the country's economy.

The Service did not submit any evidence refuting the respondent's testimony. As required by regulation, the Service did submit a written advisory opinion from the Bureau of Human Rights and Humanitarian Affairs in the Department of State pertaining to the respondent's request for asylum in the United States (Form I-589). *See* 8 C.F.R. §§ 208.7, .10(b). That opinion states that the respondent does not appear to qualify for asylum because he failed to show a well-founded fear of persecuiton in El Salvador on account of race, religion, nationality, membership in a particular social group, or political opinion.

The immigration judge found the respondent's testimony sufficient to prove that he was a founder and

member of COTAXI but insufficient to prove that he had received several death threats and had been assaulted by guerrillas. The immigration judge did not make any finding that the respondent lacked credibility; rather, he rejected a substantial portion of the respondent's testimony solely because it was self-serving.

While the immigration judge's assessment of the evidence deserves deference, we disagree with his conclusion that the respondent's testimony should be rejected solely because it is self-serving. The respondent described in specific detail the circumstances surrounding the deaths of his three friends shortly after they received threatening notes, the threats he received, and the facts surrounding his assault. His testimony as to these matters was logically consistent with his testimony about the threats made to COTAXI and its members for failing to participate in guerrilla-sponsored work stoppages. Moreover, the respondent submitted objective evidence to establish his membership in COTAXI and to corroborate his testimony that the guerrillas sought to disrupt the public transportation system of El Salvador. Thus, absent an adverse credibility finding by the immigration judge, we find the respondent's testimony, which was corroborated by other objective evidence in the record, to be worthy of belief. It remains to be determined, however, whether the respondent's facts are sufficient to meet the statutory standards of eligibility for asylum and withholding of deportation.

THE STATUTORY STANDARD FOR ASYLUM

A grant of asylum is a matter of discretion. *See* section 208 of the Act; *INS* v. *Stevic*, *supra*, at 2497-98 n.18. However, an alien is eligible for a favorable exercise of discretion only if he qualifies as a

"refugee" under section 101(a)(42)(A) of the Act. Therefore, that section establishes the statutory standard of eligibility for asylum. The pertinent portion of section 101(a)(42) provides as follows:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, ... The term "refugee" does not include any person who ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

This section creates four separate elements that must be satisfied before an alien qualifies as a refugee: (1) the alien must have a "fear" of "persecution;" (2) the fear must be "well-founded;" (3) the persecution feared must be "on account of race, religion, nationality, membership in a particular social group, or political opinion;" and (4) the alien must be unable or unwilling to return to his country or nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.[4]

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[4] While the language of section 101(a)(42)(A) excludes from the definition of a refugee any person who "ordered, incited, assisted, or otherwise participated in the persecution of any person," we do not construe this language as estab-

(1) *The alien must have a "fear" of "persecution."*

Initially, we note that Congress added the elements in the definition of a refugee to our law by means of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 197. In so doing Congress intended to conform the Immigration and Nationality Act to the United Nations Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 ("the Protocol"), to which the United States had acceded in 1968. H.R. Rep. No. 781 (Conference Report), 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S. Code Cong. & Ad. News 160, 160; S. Rep. No. 256, 96th Cong., 1st Sess. 4, 14-15 *reprinted in* 1980 U.S. Code Cong. & Ad. News 141, 144, 154-55; H.R. Rep. No. 608, 96th Cong., 1st Sess. 9-10 (1979); *see also INS* v. *Stevic*, *supra* at 2497. Article 1.2 of the Protocol [5] defines a refugee as one who:

> Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

lishing a fifth statutory element an alien must initially prove before he qualifies as a refugee. This provision is one of exclusion, not one of inclusion, and thus requires an alien to prove he did ont participate in persecution only if the evidence raises that issue.

[5] Article 1.2 of the Protocol largely incorporated the definition of a refugee contained in Article 1A(2) of the United Nations Convention Relating to the Status of Refugees (the U.N. Convention), July 28, 1951, to which the United States was not a party. *See* 19 U.S.T. 6225, 6261.

> outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

19 U.S.T. 6225, 6261.[6]

Since Congress intended the definition of a refugee in section 101(a)(42)(A) of the Act to conform to the Protocol, it is appropriate for us to consider various international interpretations of that agreement. However, these interpretations are not binding upon us in construing the elements created by the section 101(a)(42)(A) of the Act, for the determination of who should be considered a refugee is ultimately left by the Protocol to each state in whose territory a refugee finds himself. *See* Young, *Between Sover-*

[6] Despite Congress' intention to conform our law to the Protocol, the actual definition of "refugee" adopted in the Act differs in several significant respects from that in the Protocol and the U.N. Convention. First, the U.N. Convention excludes from all of its provisions several groups of persons: (1) those who have committed crimes against humanity; (2) those who have committed a serious non-political crime; and (3) those who are guilty of acts contrary to the principles of the United Nations. Article 1F of the U.N. Convention. 19 U.S.T. 6263, 6264. Thus, these groups are not eligible for refugee status under the U.N. Convention or the Protocol. The language in section 101(a)(42)(A) of the Act does not contain this exclusion.

Second, in a provision that does not pertain to grants of asylum, Congress provided that a person may qualify as a refugee even if he is still inside his country of nationality or of habitual residence so long as he has been specially designated by the President. Section 101(a)(42,(B) of the Act. Neither the Protocol nor the U.N. Convention definition of "refugee" reaches persons still within the borders of their own countries. Martin, *The Refugee Act of 1980: Its Past and Future*, Transnational Legal Problems of Refugees: 1982 Mich. Y.B. Int'l. Legal Stud. 91, 101-103 (1982).

eigns: A Reexamination of the Refugee's Status, Transnational Legal Problems of Refugees: 1982 Mich. Y.B. Int'l. Legal Stud. 399, 344-45 (1982); Office of the United Nations High Commissioner for Refugees, *The Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* 1, 3-4 (Geneva, 1979) ("*Handbook*"); *INS v. Stevic*, *supra*, at 2500 n.22.

In adding the definition of a refugee to the Act, Congress did not identify what one must show in order to establish a "fear of persecution." The phrase "fear of persecution" is not new to the Act. Prior to 1980, it appeared in former section 203(a)(7), which provided for the conditional admission to the United States of certain aliens if they fled a country because of persecution or "fear of persecution." *See* 8 U.S.C. § 1153(a)(7)(A)(i) (1976) (repealed by the Refugee Act of 1980, Pub. L. No. 96-212, § 203(c)(3), 94 Stat. 102, 107).[7] Former section 203(a)(7) was applied by Service officers in allocating visas to immigrants abroad and by district directors in determining eligibility for adjustment of status under section 245 of the Act. *See e.g. Matter of Ugricic*, 14 I&N Dec. 384 (D.D. 1972); *Matter of Adamska*, 12 I&N Dec. 201 (R.C. 1967). Immigration judges and the Board were without authority to decide applications brought under former section 203(a)(7) and

[7] Specifically, former section 203(a)(7) allowed 17,400 persons each year to be conditionally admitted to the United States if they could demonstrate that: (1) they had fled from a Communist or Communist-dominated country, or from any country in the Middle East and (2) they had fled these countries because of persecution or fear of persecution. *See* former section 203(a)(7) of the Act.

accordingly the meaning of the phrase "fear of persecution" was never directly at issue, or construed, in proceedings before the Board. *See Matter of Guiragossian*, 17 I&N Dec. 161, 163 (BIA 1979).

"Fear" is a subjective condition, an emotion characterized by the anticipation or awareness of danger. Webster's Third New International Dictionary (Unabridged) 831 (16th ed. 1971). The Office of the United Nations High Commissioner for Refugees (UNHCR) has suggested in the *Handbook* that the definition of a refugee found in the Protocol requires fear to be a person's primary motivation for seeking refugee status. *See Handbook*, *supra*, at 11-12. While we do not consider the UNHCR's position in the *Handbook* to be controlling,[8] the *Handbook* neverthe-

[8] The *Handbook* was issued in September 1979, whereas hearings on the Refugee Act were held in March and May 1979, and the Senate Judiciary Committee issued its report in July 1979. Thus, it is highly unlikely that Congress consulted the *Handbook* while drafting the definition of a refugee in the Refugee Act of 1980. *But see*, "Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to David W. Crosland, General Counsel, INS," *United States Refugee Program, Oversight Hearings before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary*, 97th Cong., 1st Sess. 26 (1981) (assuming Congress was aware of the criteria articulated in the *Handbook* at the time of passage of the Refugee Act in 1980, but nonetheless concluding the *Handbook* is only a guideline).

In addition, the jurisdiction of the UNHCR has been expanded over the years and now encompasses large groups of persons displaced by civil strife or natural disasters who simply do not qualify under the Protocol's limited definition of a "refugee." Special Project, *Displaced Persons: "The New Refugees,"* 13 Ga. J. Int'l. and Comp. Law 755, 763-71 (1983) *and authorities cites* [*sic*] *therein*. Thus, it cannot be certain to what extent the position in the *Handbook* reflects

less is a useful tool to the extent that it provides us with one internationally recognized interpretation of the Protocol.

Given the prominence of the word "fear" in the definition of a refugee created by Congress, and given the *Handbook*'s persuasive assessment in this instance that "fear" should be a refugee's primary motivation, we conclude that an alien seeking to qualify under section 101(a)(42)(A) of the Act must demonstrate that his primary motivation for requesting refuge in the United States is "fear," *i.e.*, a genuine apprehension or awareness of danger in another country. No other motivation, such as dissent or disagreement with the conditions in another country or a desire to experience greater economic advantage or personal freedom in the United States, satisfies the definition of a refugee created in the Act.

Prior to 1980 "persecution" was construed to mean either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive. *See, e.g., Kovac* v. *INS*, 407 F.2d 102, 107 (9th Cir. 1969); *Matter of Maccaud*, 14 I&N Dec. 429, 434 (BIA 1973); *Matter of Dunar*, 14 I&N Dec. 310, 320 (BIA 1973); *Matter of Diaz*, 10 I&N Dec. 199, 200 n.1 (BIA 1963); *see also Matter of Laipenieks*, 18 I&N Dec. 433, 456-57 (BIA 1983).[9] The harm or suffering inflicted

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concepts that are outside the strict definition of a "refugee" under the Protocol. *See* page [5 a], *infra*.

[9] The word "persecution" appeared not only in former section 203(a)(7) but also in the predecessors to the present withholding of deportation provision in section 243(h) of the Act and in the regulatory provisions pertaining to grants of asylum. *See INS* v. *Stevic, supra*, at 2493 and nn.6, 7; 8 C.F.R. § 108 (1980). Prior to 1980, it was construed by us and by the courts primarily in the latter two contexts.

could consist of confinement or torture. *See Blazina* v. *Bouchard*, 286 F.2d 507, 511 (3d Cir. 1961). It also could consist of economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom. *See, e.g., Dunat* v. *Burney*, 297 F.2d 744, 746 (3d Cir. 1962); *Matter of Salama*, 11 I&N Dec. 536 (BIA 1966); *Matter of Eusaph*, 10 I&N Dec. 453, 454 (BIA 1966). Generally harsh conditions shared by many other persons did not amount to persecution. *See Cheng Kai Fu* v. *INS*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). Prosecution for violating travel restrictions and laws of general applicability did not constitute persecution, unless the punishment was imposed for invidious reasons. *See Soric* v. *INS*, 346 F.2d 360, 361 (7th Cir. 1965); *Matter of Janus and Janek*, 12 I&N Dec. 866, 876 (BIA 1968).

Two significant aspects of this accepted construction of the term "persecution" were as follows. First, harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome. *See, e.g. Matter of Diaz, supra*, at 204. Thus, physical injury arising out of civil strife or anarchy in a country did not constitute persecution. *Id.* at 203. Second, harm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control. *See e.g. McMullen* v. *INS, supra*, at 1315 n.2; *Rosa* v. *INS*, 440 F.2d 100, 102 (1st Cir. 1971); *Matter of McMullen*, 17 I&N Dec. 542, 44-45 (BIA 1980); *Matter of Pierre*, 15 I&N Dec. 461, 462 (BIA 1975).

We conclude that the pre-Refugee Act construction of "persecution" should be applied to the term as it appears in section 101(a)(42)(A) of the Act. It is

a basic rule of statutory construction that words used in an original act or section, that are repeated in subsequent legislation with a similar purpose,. are presumed to be used in the same sense in the subsequent legislation. *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); *see* 1A Sands, Sutherland on Statutory Construction, § 22.33 (4th ed. 1972). Thus, we presume that Congress, in using the term "persecution" in the definition of a refugee under section 101(a)(42)(A) of the Act, intended to adopt the judicial and administrative construction of that term existing prior to the Refugee Act of 1980. *Id*; *see Commissioner of Internal Revenue* v. *Noel's Estate*, 380 U.S. 678, 681 (1965). *Cf. McMullen* v. *INS*, *supra*, at 544-45. Our presumption is reinforced by the fact that in 1978, two years before enacting the Refugee Act of 1980, Congress chose not to define the word "persecution" when using it in other provisions of the Act because the meaning of the word was understood to be well-established by administrative and court precedents. *See Matter of Laipenieks, supra*, at 456.

As was the case prior to enactment of the Refugee Act, "persecution" as used in section 101(a)(42)(A) clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome. The word does not embrace harm arising out of civil strife or anarchy: in fact, Congress specifically rejected a definition of a refugee that would have included "displaced persons," *i.e.*, those who flee harm generated by military or civil disturbances.[10] This construction is consistent with

[10] The Senate bill contained a definition of "refugee" that included "displaced persons" and referred, in part, to "any person who has been displaced by military or civil disturbance or uprooted because of arbitrary detention" who is unable to return to "his usual place of abode." *See* S.643, 96th Cong., 1st Sess. § 201(a) (1979); S. Rep. No. 96-256, *supra*, at 4. The House bill did not contain such a provision. *See* H.R. 2816, 96th Cong., 1st Sess. § 201(a) (1979). The conference committee adopted the House version, thereby rejecting a definition of "refugee" that included "displaced persons." *See* H.R. Rep. 96-781, *supra*, at 19; *see also* section 101(a)(42)(A) of the Act.

the international interpretation of "refugee" under the Protocol, for that term does not include persons who are displaced by civil or military strife in their countries of origin. *See* Special Project, *supra* note 8, at 763-69, *and authorities cited therein.*

In the case before us, we find that the respondent has adequately established that his primary motivation for seeking asylum is fear of persecution. We must now consider whether it has been demonstrated that this fear is well founded and whether the other elements necessary to establish eligibility for asylum have been satisfied.

(2) *The fear of persecution must be "well-founded."*

In 1973 in *Matter of Dunar*, we construed the meaning of "well-founded fear of persecution," as that phrase is used in the Protocol, as follows:

> [T]he requirement that the fear is "well-founded" rules out an apprehension which is purely subjective. . . . Some sort of showing must be made and this can ordinarily be done only by objective evidence. The claimant's own testimony as to the facts will sometimes be all that is available; *but the crucial question is whether the testimony, if accepted as true, makes*

> *out a realistic likelihood that he will be persecuted. . . .*

Matter of Dunar, supra, at 319 (emphasis added). Our construction of the Protocol's well-founded-fear standard was accepted by the courts and thereafter "a well-founded fear" of persecution was understood to mean that an alien had to produce objective evidence showing a likelihood or probability of persecution. *See INS* v. *Stevic, supra,* at 2495-96 and n.12 *and cases cited therein*; *Kashani* v. *INS, supra,* at 379. Thus, during 1979 and 1980, the years in which Congress drafted, considered, and enacted the definition of "refugee" in section 101(a)(42)(A) of the Act, the accepted administrative and judicial construction in this country of the well-founded-fear standard was one that linked this standard to objective facts, as opposed to purely subjective fear, and to the likelihood of persecution. *See id.*

Congress did not indicate in the legislative history of the Refugee Act of 1980 that it intended to alter the accepted construction of "a well-founded fear of persecution" by using this phrase in the definition of a refugee in section 101(a)(42)(A) of the Act. Moreover, the pre-Refugee Act construction of "a well-founded fear of persecution" is nearly identical to that proposed by the authority on international refugee law, Atle Grahl-Madsen, in his treatise on the meaning of the U.N. Convention and the Protocol:

> The adjective 'well-founded' suggests that it is not the frame of mind of the person concerned which is decisive for his claim to refugeehood, but that this claim should be measured with a more objective yardstick. . . .
>
> We cannot find a meaningful denominator in the minds of refugees. We must seek it in the conditions prevailing in the country whence they have fled.
>
> *'Well-founded fear of being persecuted' may therefore be said to exist, if it is likely that the person concerned will become the victim of persecution if he returns to his country of origin.*
>
> *. . . [T]he real test is the assessment of the likelihood of the applicant's becoming a victim of persecution upon his return to his country of origin. If there is a real chance that he will suffer persecution, that is reason good enough, and his 'fear' is 'well-founded.'*

1 A. Grahl-Madsen, The Status of Refugees in International Law, §§ 76, 77 at 173, 175, 181 (1966) (emphasis added). Lastly, the pre-Refugee Act construction of "a well-founded fear of persecution" is consistent with the intention of the drafters of the U.N. Convention, for by the use of this language the drafters were seeking to introduce an objective, as opposed to a purely subjective, test for the determination of refugee status. 1 A. Grahl-Madsen, *supra,* § 78 at 179.[11]

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[11] The committee that drafted the phrase, "a well-founded fear of persecution," in the U.N. Convention defined the phrase to mean that a person actually must have been a victim of persecution or be able to show "good reason" why he fears persecution. *Matter of Dunar, supra,* at 319. That committee considered various proposals defining refugee status in terms of being unwilling to return to one's country of origin because of "serious apprehension based on reasonable grounds of . . . persecution," or a "justifiable fear of persecution," or a "fear of persection," before selecting the term "well-founded" to describe the nature of the fear that qualified one as a refugee. United Nations Document E/AC.32/L.2 (17 January 1950); United Nations Document E/AC.32/L.3 (17 January 1950)

Since there is no indication that Congress intended to depart from the accepted judicial and administrative construction of "a well-founded fear of persecution" and since this construction is consistent with the U.N. Convention and the Protocol, we see no valid reason for departing from the construction of the well-founded-fear standard that prevailed in this country prior to the Refugee Act of 1980. Accordingly, we continue to construe "a well-founded fear of persecution" to mean that an individual's fear of persecution must have its basis in external, or objective, facts that show there is a realistic likelihood he will be persecuted upon his return to a particular country.

As has always been the case, our construction of the well-founded-fear standard reflects two fundamental concepts. The first is that in order to be "well-founded," an alien's fear of persecution cannot be

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at 1 and 2; United Nations Document E/AC.32/L.4 and Add.1. In addition, the committee was guided by prior international agreements pertaining to refugees, one of which was the Constitution of the International Refugee Organization (IRO). United Nations Economic and Social Council, *Report of the Ad-Hoc Committee on Statelessness and Related Problems*, February 17, 1950, at 37 (E/1618; E/AC.32/5). The IRO Constitution provided that refugees and displaced persons became the concern of the IRO if, *inter alia*, they had valid objections to returning to their countries of origin, such as "persecution or fear, based on reasonable grounds of persetion." Constitution of the International Refugee Organization, Part I, §§ A, B, C.1(a)(i), 62 Stat. 3037, ratified by United States on December 16, 1946 (T.I.A.S. No. 1846) effective August 30, 1948); 1948 U.S. Code Cong. Service 2042, 2051-52. Thus, we conclude that in using the phrase "well-founded fear of persecution," the drafters of the U.N. Convention were attempting to create an objective measure of the fear of persecution.

purely subjective or conjectural, it must have a solid basis in objective facts or events. *Compare Matter of Martinez-Romero*, 18 I&N Dec. 75, 79 (BIA 1981) (an alien did not show a well-founded fear of persecution because there were no objective facts supporting his claim to asylum) *with Matter of Dunar*, *supra*, at 319 (a showing of a well-founded fear of persecution rules out a purely subjective apprehension and requires a showing to be made by objective evidence). This concept, after all, is consistent with the generally understood meaning of the term "well-founded," which refers to something that has a firm foundation in fact or is based on excellent reasoning, information, judgment, or grounds. *See* Webster's Third New International Dictionary, *supra*, at 2595.

The second fundamental concept that is, and always has been, reflected in our construction of "a well-founded fear of persecution" is that in order to warrant the protection afforded by a grant of refuge, an alien must show it is likely he will become the victim of persecution. *Compare Matter of Salim*, *supra*, at 313-15 (an alien established eligibility for asylum and met the well-founded fear standard because she showed the requisite "likelihood" of persecution) *with Matter of Dunar*, *supra*, at 319 (the crucial question under the well-founded fear standard is whether a person has shown a realistic "likelihood" of persecution). Since language by its nature is inexact, we have used such words as "likelihood," or "realistic likelihood," or even "probability" of persecution to express this concept. *See, e.g., Matter of Salim*, *supra*; *Matter of Dunar*, *supra*. By use of such words we do not mean that "a well-founded fear of persecution" requires an alien to establish to a particular degree of certainty, such as a "probabil-

ity" as opposed to a "possibility," that he will become a victim of persecution. Rather, as a practical matter, what we mean can best be described as follows: the evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien. The first of these factors is inherent in the showing that the conduct the alien fears amounts to "persecution" under the Act, *i.e.*, the infliction of suffering or harm in order to punish an alien because he differs in a way a persecutor deems offensive and seeks to overcome. The second, third, and fourth factors are all indispensable in showing that there is a real chance an alien will become a victim of persecution, for if the persecutor is not aware or could not easily become aware that an alien possesses the characteristic that is the basis for persecution, or if the persecutor lacks the capability to carry out persecution, or if the persecutor has no inclination to punish the particular alien, then it cannot reasonably be found that the alien is likely to become the persecutor's victim. The issue of whether an alien's facts demonstrate these four factors is one that ordinarily must be decided on a case-by-case basis, for the question of what kinds of facts show a likelihood of persecution ultimately depends upon each alien's own particular situation. "[T]he likelihood of becoming a victim of persecution may vary from person to person. For example, a well-known personality may be more exposed to persecution than a person who has always

remained obscure. . . . therefore [it is] necessary to assess the situation of each person on its own merits." 1 A. Grahl-Madsen, *supra*, § 76 at 175.

To date the courts have not agreed upon a common description of the well-founded-fear standard in section 101(a)(42)(A) of the Act. The Third Circuit has essentially adopted our language and concluded that "a realistic likelihood" of persecution accurately describes the well-founded-fear standard. *Compare Rejaie* v. *INS*, *supra*, at 146 *with Matter of Dunar*, *supra*, at 319. The Sixth, Seventh, and Ninth Circuits, on the other hand, appear to have chosen the language "good reason" or "valid reason" to fear persecution to describe this standard. *Bolanos-Hernandez* v. *INS*, *supra*, at 1322; *Youkhanna* v. *INS*, *supra*, at 362; *Carvajal-Munoz* v. *INS*, *supra*, at 574, 576, 577; *see also*, *Stevic* v. *Sava*, 678 F.2d 401, 405-06 (2d Cir. 1982), *rev'd on other grounds*, *INS* v. *Stevic*, *supra*. We think that on their face descriptions such as "good reason" or "valid reason" to fear persecution do not adequately describe the well-founded-fear standard. To the extent that such words could be interpreted to mean that an alien's fear of persecution need only be plausible, they do not reflect the generally understood meaning of "well-founded." *See* page [51a], *supra*. Nor do these words reflect the understanding of Congress, and the meaning of the Protocol, that an alien must show it is likely he will become a victim of persecution before he is eligible for refuge. *See* pages [48a-49a], *supra*.

Moreover, as a practical matter, we are not certain that these descriptions most accurately describe the analysis used by the courts when ascertaining whether an alien's fear of persecution is "well-founded." No matter how the courts have described the well-

founded-fear standard, they have required an alien to come forward with more than his purely subjective fears of persecution; he has been required to show that his fears have a sound basis in personal experience or in other external facts or events. *See, e.g., Bolanes-Hernandez* v. *INS, supra,* at 1321 and n.11; *Youkhanna* v. *INS, supra,* at 362; *Carvajal-Munoz, supra,* at 574, 576, 577; *Rejaie* v. *INS, supra,* at 145-46. In addition, each of the courts has assessed an alien's facts to determine whether he is likely to become a victim of persecution and, in so doing, has looked for facts demonstrating some combination of the four factors we have used to describe a likelihood of persecution. *See, e.g., Bolanos-Hernandez* v. *INS, supra,* at 1324; *Dally* v. *INS,* 744 F.2d 1191, 1196 (6th Cir. 1984); *Carvajal-Munoz* v. *INS, supra,* at 577-79; *Chavez* v. *INS,* 723 F.2d 1431, 1433-34 (9th Cir. 1984); *Shaoee* v. *INS,* 704 F.2d 1079, 1083-84 (9th Cir. 1983).

Our construction of "a well-founded fear of persecution" is also consistent with some aspects of the UNHCR's interpretation of the Protocol. Like us, the UNHCR is of the opinion that the term "well-founded" requires a person's fear of persecution to be more than a matter of personal conjecture and to be supported by an objective situation. *Handbook, supra,* at 11-13, paragraphs 38, 41. Furthermore, the UNHCR is of the opinion that a person claiming a well-founded fear of persecution must show that he is not tolerated by, and has come to the attention of, a persecutor. *Handbook, supra,* at 19, paragraph 80. However, we are not certain that the UNHCR's position adequately reflects the concept, inherent both in the Protocol and in the construction of the well-

founded-fear standard at the time Congress employed it in section 101(a)(42)(A) of the Act, that refuge in this country should be dependent upon a showing of a likelihood of persecution. For example, the UNHCR advocates that a well-founded fear of persecution is established merely if an alien finds his return to a country to be "intolerable" or wishes to avoid situations entailing some risk of persecution. *Handbook, supra,* at 12-13, paragraphs 42, 45. Therefore, to the extent that the UNHCR's position in the *Handbook* does not require an individual to show he is likely to become a victim of persecution, we find that position to be inconsistent with Congress' intention and with the meaning of the Protocol.

Given our construction of the showing required by the language "a well-founded fear of persecution," it remains to be determined how this showing compares with the "clear probability" of persecution required for section 243(h) withholding of deportation. The Third and Seventh Circuits view the well-founded-fear and clear-probability standards to be either identical or very similar to one another. *Sotto* v. *INS, supra,* at 836; *Carvajal-Munoz, supra,* at 574-75. The Ninth Circuit, on the other hand, has concluded that the well-founded-fear standard is more generous to an alien than the clear-probability standard. *Bolanos-Hernandez* v. *INS, supra,* at 1321; *see also Stevic* v. *Sava, supra,* at 406.

One might conclude that "a well-founded fear of persecution, which requires a showing that persecution is likely to occur, refers to a standard that is different from "a clear probability of persecution," which requires a showing that persecution is "more likely than not" to occur. As a practical matter,

however, the facts in asylum and withholding cases do not produce clear-cut instances in which such fine distinctions can be meaningfully made. Our inquiry in these cases, after all, is not quantitative, *i.e.*, we do not examine a variety of statistics to discern to some theoretical degree the likelihood of persecution. Rather our inquiry is qualitative: we examine the alien's experiences and other external events to determine if they are of a kind that enable us to conclude the alien is likely to become the victim of persecution. In this context, we find no meaningful distinction between a standard requiring a showing that persecution is likely to occur and a standard requiring a showing that persecution is more likely than not to occur. As we construe them, both the well-founded-fear standard for asylum and the clear-probability standard for withholding of deportation require an alien's facts to show that the alien possesses a characteristic a persecutor seeks to overcome by punishing the individuals who possess it, that a persecutor is aware or could easily become aware the alien possesses this characteristic, that a persecutor has the capability of punishing the alien, and that a persecutor has the inclination to punish the alien. Accordingly, we conclude that the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge.

Our position is most consistent with what we perceive to have been Congress' understanding of the relationship between asylum and withholding of deportation at the time the present provisions were enacted in the Refugee Act of 1980. Prior to 1980, asylum and withholding of deportation were closely related forms of relief, and asylum was available if an alien could show the same likelihood of persecution

that was required for withholding of deportation.[12] The legislative history of the Refugee Act does not contain any express indication that Congress intended to alter this relationship; quite the contrary, the legislative history indicates that Congress understood it was preserving this relationship.[13]

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[12] Prior to the Refugee Act of 1980, a request for asylum filed after completion of deportation proceedings was considered to be a request for section 243(h) withholding of deportation and for, *inter alia*, the benefits of Article 33 of the Protocol and the U.N. Convention which prohibit the expulsion of a refugee to a place where his "life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion." *INS* v. *Stevic*, *supra*, at 2494, 2496 n.13; *see also* 8 C.F.R. § 108.3(a) (1980). An applicant for asylum had the burden of proving that he "would be subject to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . ." 8 C.F.R. § 108.3(c) (1980).

Similarly, withholding of deportation under section 243(h) of the Act was construed to be comparable to the benefit afforded by Article 33 of the Protocol and the U.N. Convention. *See Matter of Dunar*, *supra*, at 319-20. An alien seeking withholding of deportation, like an alien seeking asylum, was required to show he "would be subject to persecution on account of race, religion, or political opinion. *See INS* v. *Stevic*, *supra*, at 2493 and nn.6, 7; 2496 n.13; 8 C.F.R. § 242.17(c) (1980).

[13] The Senate bill required that in order to be eligible for asylum an alien must meet the well-founded-fear definition of a refugee *and* must show that his deportation or return was prohibited by the section 243(h) withholding of deportation provision. S.643, *supra* note 10, § 203(e); S. Rep. No. 96-256, *supra*, at 16. The Senate assumed that this did not change the then-existing substantive standard for asylum. S. Rep. No. 96-256, *supra*, at 9. The House bill contained an asylum provision that made no express reference to withholding of deportation. *See* H.R. 2816, *supra* note 10, § 203(e). However, the House Judiciary Committee perceived asylum

Thus, under the changes made by the Refugee Act of 1980, an alien is eligible for asylum if he meets all of the other elements in the definition of a refugee under section 101(a)(42)(A) of the Act and can show "a well-founded fear of persecution," *i.e.*, objective facts that demonstrate it is likely he will become a victim of persecution. Section 208(a) of the Act. A grant of asylum provides him not only with temporary refuge in this country, but with the possibility of obtaining permanent refuge here, *i.e.*, an opportunity to become a lawful permanent resident. Section 209(b) of the Act. However, asylum is ultimately a matter of discretion. Section 208(a) of the Act. An alien may be denied asylum as a matter of discretion, may be found deportable or excludable, and then may find himself in the position of being expelled. In such a situation he is nonetheless protected against expulsion to the country of persecution, so long as he qualifies for withholding of deportation. *See* section 243(h)(1) and (2) of the Act. However, withholding of deportation only protects the alien

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and withholding of deportation to be related forms of relief accomplishing the same end, namely that of conforming United States law to the obligation of Article 33 of the Protocol and the U.N. Convention. H.R. Rep. No. 96-608, *supra*, at 17-18. The conference committee adopted the House's version of the asylum provision, and thus in the language of the statute did not link asylum to withholding of deportation. *See* H.R. Rep. No. 96-781, *supra*, at 5. Nevertheless, in its report the committee perceived asylum and withholding of deportation to be interchangeable and did not distinguish them as separate forms of relief. *Id.* at 20. We think these facts show that Congress understood the functions of asylum and withholding of deportation to be closely related and the standards of eligibili y for these forms of relief to be essentially comparable. *But see Carvajal-Munoz* v. *INS*, *supra*, at 574-75 n.15.

from being expelled to the country in which his life or freedom would be threatened, it does not prevent his expulsion to some other country. *Compare* subsections (a) and (h) of section 243 of the Act.

We note that the Seventh Circuit has viewed this statutory structure as lending support for the conclusion that the standards for withholding of deportation and asylum are somewhat different from one another, for the court has concluded that Congress reasonably could have intended an entitlement to withholding of deportation to be available upon a greater showing than that required for a discretionary grant of asylum. *Carvajal-Munoz*, *supra*, at 575. Conversely, however, the structure of the Act also lends support for the conclusion that Congress intended withholding deportation to be available upon a lesser showing than that required for asylum, because the right to avoid deportation to one particular country, which is afforded by withholding of deportation, is a lesser benefit than the privileges of remaining in this country under a grant of refuge and of becoming a permanent resident, which are afforded by asylum. Since the structure of the Act reasonably supports two contrary conclusions about the relationship between the standards for asylum and withholding of deportation, we do not find the Act's structure to be particularly helpful in ascertaining Congress' understanding or intention. Rather, we find a better indication of Congress' intention in the legislative history showing that Congress perceived the standards for asylum and withholding of deportation to be comparable to one another.

In the case before us, the respondent claims he fears persecution at the hands of two groups: the government and the guerrillas. Therefore, under our

construction of the well-founded-fear standard, the respondent must show that his fear of persecution by these groups is more than a matter of personal conjecture or speculation; he must show by objective events that his fear has a sound basis in fact and that persecution by the government or by the guerrillas is likely to occur if he is returned to El Salvador. This means that he must demonstrate that: (1) he possesses characteristics the government or the guerrillas seek to overcome by means of punishment of some sort; (2) the government or the guerrillas are aware or could easily become aware that he possesses these characteristics; (3) the government or the guerrillas have the capability of punishing him; and (4) the government and the guerrillas have the inclination to punish him.

The respondent's fear of persecution by the government has no basis whatsoever in either his personal experiences or in other external events. To the contrary, by the respondent's own admission this fear is based solely on his impression that some officials in the government may have viewed COTAXI as being too socialistic. This purely subjective impression is not sufficient to show a well-founded fear of persecution by the government.

In addition, whatever the facts may have been prior to the respondent's departure from El Salvador, those facts have changed significantly since 1981. Most importantiy, the respondent admitted that he does not intend to work as a taxi driver upon his return to El Salvador. The respondent's facts do not show that the persecution of taxi drivers continued even after they stopped working as drivers. Furthermore, the respondent testified that the guerrillas' strength has diminished significantly in El Salvador

since 1981. For these reasons, the respondent has not shown that at the present time he possesses characteristics the guerrillas seek to overcome or that the guerrillas have the inclination to punish him. Thus, the facts do not demonstrate that there is a likelihood the respondent would be persecuted by the guerrillas should he be returned to El Salvador, and accordingly his fear of persecution upon deportation has not been shown to be well-founded.

(3) *The persecution feared must be "on account of race, religion, nationality, membership in a particular social group, or political opinion.*["]

The respondent has argued that the persecution he fears at the hands of the guerrillas is on account of his membership in a particular social group comprised of COTAXI drivers and persons engaged in the transportation industry of El Salvador and is also on account of his political opinion.

The requirement of persecution on account of "membership in a particular social group" comes directly from the Protocol and the U.N. Convention. *See* page [40a], *supra*. Congress did not indicate what it understood this ground of persecution to mean nor is its meaning clear in the Protocol. This ground was not included in the definition of a refugee proposed by the committee that drafted the U.N. Convention; rather it was added as an afterthought. 1 A. Grahl-Madsen, *supra*, at 219. International jurisprudence interpreting this ground of persecution is sparse. G. Goodwin-Gill, The Refugee in International Law 30 (1983). It has been suggested that the notion of a "social group" was considered to be of broader application than the combined notions of racial, ethnic, and religious groups and that in order to stop a pos-

sible gap in the coverage of the U.N. Convention, this ground was added to the definition of a refugee. 1 A. Grahl-Madsen, *supra*, at 219. A purely linguistic analysis of this ground of persecution suggests that it may encompass persecution seeking to punish either people in a certain relation, or having a certain degree of similarity, to one another or people of like class or kindred interests, such as shared ethnic, cultural, or linguistic origins, education, family background, or perhaps economic activity. G. Goodwin-Gill, *supra*, at 31. The UNHCR has suggested that a "particular social group" connotes persons of similar background, habits, or social status and that a claim to fear persecution on this ground may frequently overlap with persecution on other grounds such as race, religion, or nationality. *Handbook*, *supra*, at 19.

We find the well-established doctrine of *ejusdem generis*, meaning literally, "of the same kind," to be most helpful in construing the phrase "membership in a particular social group." That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with specific words. *See, e.g., Cleveland* v. *United States*, 329 U.S. 14 (1946), 2A Sands, Sutherland on Statutory Construction, *supra*, § 47.17. The other grounds of persecution in the Act and the Protocol listed in association with "membership in a particular social group" are persecution on account of "race," "religion," "nationality," and "political opinion." Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed. *See* 1 A. Grahl-Madsen, *supra*, at 217; Goodwin-Gill,

supra, at 31. Thus, the other four grounds of persecution enumerated in the Act and the Protocol restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

Applying the doctrine of *ejusdem generis*, we interpret the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed. By construing "persecution on account of membership in a particular social group" in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

In the respondent's case, the facts demonstrate that the guerrillas sought to harm the members of

COTAXI, along with members of other taxi cooperatives in the city of San Salvador, because they refused to participate in work-stoppages in that city. The characteristics refining the group of which the respondent was a member and subjecting that group to punishment were: being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages. Neither of these characteristics is immutable because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work-stoppages. It may be unfortunate that the respondent either would have had to change his means of earning a living or cooperate with the guerrillas in order to avoid their threats. However, the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice. *See* 1 A. Grahl-Madsen, *supra*, at 214. Therefore, because the respondent's membership in the group of taxi drivers was something he had the power to change, so that he was able by his own actions to avoid the persecution of the guerrillas, he has not shown that the conduct he feared was "persecution on account of membership in a particular social group" within our construction of the Act.

Moreover, the respondent did not demonstrate that the persecution he fears is "on account of political opinion." The fact that the respondent was threatened by the guerrillas as part of a campaign to destabilize the government demonstrates that the guerrillas' actions were undertaken to further their political goals in the civil controversy in El Salvador. However, conduct undertaken to further the goals of one faction in a political controversy does not necessarily constitute persecution "on account of political opin-

ion" so as to qualify an alien as a "refugee" within the meaning of the Act.

As we have previously discussed, the term "persecution" means the infliction of suffering or harm in order to punish an individual for possessing a particular belief or characteristic the persecutor seeks to overcome. It follows, therefore, that the requirement of "persecution on account of political opinion" means that the particular belief or characteristic a persecutor seeks to overcome in an individual must be his political opinion. Thus, the requirement of "persecution on account of political opinion" refers not to the ultimate political end that may be served by persecution, but to the belief held by an individual that causes him to be the object of the persecution. *See* 1 A. Grahl-Madsen, *supra*, at 212, 220; G. Goodwin-Gill, *supra*, at 31. This construction is consistent with the other grounds of persecution enumerated in the Act such as "race", "religion", "nationality," and "membership in a particular social group," each of which specifies a characteristic an individual possesses that causes him to be subject to persecution. Moreover, this construction is consistent with Congress' intention that not all harm with political implications, such as that which arises out of civil strife in a country, qualifies an alien as a "refugee." *See* discussion page[s 46a-47a] and note 10 *supra*.

In the respondent's case there are no facts showing that the guerrillas were aware of or sought to punish the respondent for his political opinion; nor was there any showing that the respondent's refusal to participate in the work-stoppages was motivated by his political opinion. Absent such a showing, the respondent failed to demonstrate that the particular belief the guerrillas sought to overcome in him was his

political opinion. Therefore he does not come within this ground of persecution.

(4) *The alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.*

Traditionally, a refugee has been an individual in whose case the bonds of trust, loyalty, protection, and assistance existing between a citizen and his country have been broken and have been replaced by the relation of an oppressor to a victim. *See* 1 A. Grahl-Madsen, *supra*, at 97, 100. Thus, inherent in refugee status is the concept that an individual requires international protection because his country of origin or of habitual residence is no longer safe for him. *Id.* We consider this concept to be expressed, in part, by the requirement in the Act and the Protocol that a refugee must be unable or unwilling to return to a particular "country." *See* section 101(a)(42)(A) of the Act. We construe this requirement to mean that an alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place or abode within a country; he must show that the threat of persecution exists for him country-wide.

In the respondent's case, the facts show that taxi drivers in the city of San Salvador were threatened with persecution by the leftist guerrillas. However, the facts do not show that this threat existed in other cities in El Salvador. It may be the respondent could have avoided persecution by moving to another city in that country.[15] In any event, the respondent's facts

[15] It is unfortunate when persons may be obliged to give up their jobs and leave their homes as a result of fear. But that is not the issue here. The issue is, once that decision is made, does an individual have the right to come to the United States rather than to move elsewhere in his home country.

did not demonstrate that the guerrillas' persecution of taxi drivers occurred throughout the country of El Salvador. Accordingly, the respondent did not meet this element of the standard for asylum.

In summary, the respondent's facts fail to show: (1) that his present fear of persecution by the government and the guerrillas is "well-founded;" (2) that the persecution he fears is on account of one of the five grounds specified in the Act; and (3) that he is unable to return to the country of El Salvador, as opposed to a particular place in that country, because of persecution. Thus, he has not met three of the four elements in the statutory definition of a refugee created by section 101(a)(42)(A) of the Act. Accordingly, the respondent has not shown he is eligible for a grant of asylum.

THE STATUTORY STANDARD FOR WITHHOLDING OF DEPORTATION

Section 243(h) of the Act, which specifies the standard of eligibility for withholding of deportation, requires an alien to show a clear probability of persecution, *i.e.*, that it is more likely than not he will be the victim of persecution, in a particular country. *INS* v. *Stevic*, *supra*, at 2498. As we indicated, *supra*, the showing of the likelihood of persecution contemplated by this standard converges, in practice, with the showing required by the well-founded-fear standard for asylum. Therefore, since the respondent has not demonstrated a sufficient likelihood of persecution at the hands of either the government or the guerrillas to make his fear "well-founded," it follows

that the respondent has not demonstrated the "clear-probability" of persecution needed for withholding of deportation. Moreover, since the conduct the respondent fears has not been shown to be inflicted on account of "membership in a particular social group" or "political opinion" within our construction of the Act, the respondent has also failed to show that he comes within one of the five grounds of persecution specified in section 243(h). Accordingly, the respondent has not met the standard of eligibility for withholding of deportation.

For the foregoing reasons the respondent has not shown he is eligible for asylum or withholding of deportation to El Salvador. Therefore, we shall dismiss his appeal.

ORDER: The appeal is dismissed.

Chairman

MJP:cls

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